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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS PECORA and JAMES PAONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION OF THOMAS PECORA AND JAMES PAONE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED:

1. WHETHER THE DECISION BELOW WAS IN ERROR BY HOLDING THAT SUFFICIENT EVIDENCE HAD BEEN PRESENTED BY THE GOVERNMENT TO ESTABLISH THE PREDICATE TAFT-HARTLEY OFFENSES UNDERLYING THE RICO (18 U.S.C. §1961 et seq.) CHARGES IN THE INDICTMENT:

(a) WHETHER THE COURT OF APPEALS INTERPRETED THE TERM "REPRESENTATIVE" AS CONTAINED IN THE TAFT-HARTLEY ACT IN A MANNER INCONSISTENT WITH THIS COURT'S DECISION IN UNITED STATES V. RYAN, 350 U.S. 299 (1956), I.E., WHETHER REPRESENTATION EXISTS IF EMPLOYEES JOIN A WELFARE FUND, A SEPARATE AND DISTINCT ENTITY FROM THE UNION, FOR THE SOLE PURPOSE OF PARTICIPATING IN THE FUND'S INSURANCE PLAN.

(b) WHETHER THE COURT OF APPEALS INCORRECTLY DETERMINED THAT A UNION "WOULD ADMIT TO MEMBERSHIP" CERTAIN EMPLOYEES, AS THAT TERM IS USED IN THE TAFT-HARTLEY ACT, WHERE THAT UNION WAS BARRED FROM ADMITTING SUCH EMPLOYEES BY A LEGALLY BINDING MEMORANDUM OF UNDERSTANDING AND AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

(c) WHETHER ALLEGED PAYMENTS TO A UNION OFFICER CAN BE DEEMED TO BE IN VIOLATION OF THE TAFT-HARTLEY ACT WHERE NEITHER THE UNION NOR THE UNION OFFICER IN FACT REPRESENTS THE EMPLOYEES OF THE ALLEGED PAYOR EMPLOYER, AND WHERE REPRESENTATION IS ALSO BARRED BY FORCE OF LAW.

2. WHETHER THE DECISION BELOW THAT A CRITICAL TAPED CONVERSATION WAS "IN FURTHERANCE" OF THE CONSPIRACY, AND THEREFORE ADMISSIBLE UNDER FRE 801(d)(2)(E), WAS CONTRARY TO LANDMARK

DECISIONS OF THIS COURT INTERPRETING THE "IN FURTHERANCE" REQUIREMENT FOR ADMISSIBILITY OF CO-CONSPIRATOR'S STATEMENTS, UNDER CIRCUMSTANCES IN WHICH THE CONVERSATION RELATED TO AN ATTEMPT TO COVER UP PAST EVENTS BEFORE A GRAND JURY AND THE CONVERSATION DID NOT PROMOTE THE OBJECTIVES OF THE SEPARATE AND DISTINCT RICO CONSPIRACY ALLEGED IN THE INDICTMENT.

3. WHETHER A DEFENDANT'S SIXTH AMENDMENT RIGHTS ARE VIOLATED WHEN A TAPED CONVERSATION IS INTRODUCED AS EVIDENCE UNDER FRE 801(d)(2)(E) AND THE DEFENDANTS ARE NOT PARTIES TO THAT CONVERSATION, SUBSTANTIAL QUESTIONS EXIST AS TO THE RELIABILITY OF THE PARTICIPANTS IN THE CONVERSATION AND THE GOVERNMENT FAILS TO PROVE THAT THE PARTICIPANTS ARE UNAVAILABLE FOR TRIAL AND THEREFORE NOT SUBJECT TO CROSS-EXAMINATION?

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LIST OF PARTIES TO THE PROCEEDING
BEFORE THE COURT OF APPEALS
FOR THE THIRD CIRCUIT.

United States of America,

Respondent,

JAMES PAONE AND THOMAS PECORA,

Appellants,

OPINIONS DELIVERED BELOW

A written opinion was rendered by the United States Court of Appeals for the Third Circuit (App. A).[1] The opinion was filed on July 2, 1986 and is published at 798 F.2d 614.

An unpublished, written opinion was filed by the trial court on July 17, 1984 with regard to the Defendants' motions for judgment of acquittal and for a new trial (App. D).

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[1] References to the Appendix to this petition shall be designated "App." "A" followed by a page number refers to the Appendix filed with the Third Circuit Court of Appeals. DSA refers to the Defendants' Supplemental Appendix filed below.

JURISDICTION

The jurisdiction of this Court to review the judgment of the Third Circuit Court of Appeals is invoked pursuant to 28 U.S.C. §1254(1).

Petitioners' convictions were affirmed by the Third Circuit Court of Appeals on July 2, 1986 (App. A and B). A petition for rehearing en banc was timely filed and the request denied by the Third Circuit of Appeals on August 21, 1986 (App. C). This petition was timely filed within sixty (60) days of the order denying the petition for rehearing en banc.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U.S.C. §1961(1)(A)

"Racketeering activity" means...any act which is indictable under Title 29 U.S.C. §186 (dealing with restrictions on payments and loans to labor organizations)....

29 U.S.C. §186

29 U.S.C. §186(a) - It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, any money or other thing of value -

(1) To any representative of any of his employees who are employed in an industry affecting commerce; or

(2) To any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

...

(4) To any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

29 U.S.C. §186(b)(1) - It shall be unlawful for any person to request, demand, receive or accept, or agree to receive or accept, any payment, loan, or delivery of any

money or other thing of value prohibited by subsection (a) of this section.

FRE 801(d)(2)(E)

A statement is not hearsay if...(2) The statement is offered against a party and is...(E) A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

(a) Indictment.

The two-count indictment charged defendants with violations of 18 U.S.C. §1962(c) and (d), the RICO statute. The specific predicate offenses alleged in the indictment, upon which the RICO charges were based, involve violations of 29 U.S.C. §186(a) and (b), the Taft-Hartley Act.

Count I charged defendants with a conspiracy to conduct the affairs of an enterprise, Federico Trucking, Inc. (hereinafter "FTI"), the alleged employer, through a pattern of racketeering activity which involved multiple violations of the Taft-Hartley Act. Count II charged the defendants substantively with the same violations.

The indictment covered a time period from approximately December, 1972 through August, 1981. During this period Biagio Federico was the sole owner and President of

FTI and James Paone was a business agent and Recording Secretary for Teamsters Local 863 (24T7-12; 24T13-17).[2] Defendant Thomas Pecora became employed by FTI in September, 1973 (5T52-3 to 4: 5T57-9 to 22; 6T144-7 to 16) and became the General Manager in mid-1974 (3/1/84, T26-10 to 22).

The pattern of racketeering charge consisted of alleged payments in violation of Taft-Hartley to James Paone by Federico and Pecora as employers. It was alleged that the unlawful payments were made by means of sham salary payments to five no-show employees of FTI, which payments were passed on to James Paone.

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[2] Transcript references will be according to the designated volumes, e.g., Volume 7 is referred to as "7T". Where no volume designation has been given, a specific date reference will be provided, e.g., "T 3/1/84". A cross reference of the transcripts to the Appendix filed in the Third Circuit is contained in the Index to Appendix located in the front of each volume of the Appendix.

(b) History of S. Federico Trucking (hereinafter "S. Federico").

S. Federico was a New York Corporation, located in that state and organized in the early 1950's (5T5-4 to 5T5-13; 5T5-20 to 5T6-2; 6T35-18 to 6T36-16). During the early 1960's, long prior to the formation of FTI, S. Federico was engaged contractually as an independent with Wakefern Food Corporation to handle the pick up and delivery of grocery produce to Wakefern's warehouse in Elizabeth, New Jersey and eventually to Wakefern's Shop-Rite food stores (7T55-11 to 7T56-17).

(c) History of FTI.

FTI is a New Jersey corporation with principal offices in Edison, New Jersey (5T5-20 to 5T6-2). FTI was incorporated by Biagio Federico in December, 1972 and entered into a contract with FoodHaulers, Inc., a subsidiary of Wakefern, under the terms of which FTI was engaged as an independent trucking firm to handle the delivery of bakery products for

Wakefern's new bakery division (7T56-24 to 7T62-19).

Both S. Federico and FTI were commonly owned and operated by Biagio Federico. In the field of labor law two corporations which are commonly owned and controlled such as S. Federico and FTI, are considered to be a single employer. Expert witnesses in the field of labor law testified to that effect and this testimony was uncontradicted (A456-24 to A564-1; A601-5 to 18).

(d) Contractual relationship between Local 202 and S. Federico and FTI.

The evidence at trial indicated that S. Federico had a long-existing contractual relationship with Local 202 of the International Brotherhood of Teamsters, by virtue of which Local 202 represented the driver employees of S. Federico. Various labor contracts between Local 202 and the Produce Truckmen's Association, of which S. Federico or FTI were named parties, dating

from January 16, 1957 through January 15, 1986, were introduced as evidence at trial (22T23-13 to 22T24-15; 22T27-4 to 22T35-8). All of these contracts identified either S. Federico or FTI as being a member of the Association whose driver employees were covered by the agreement and represented by Local 202. One of these contracts (A310) covered the period between January 16, 1971 and January 15, 1974, during which the Wakefern bakery operation went into effect.

(e) Local 863.

It was stipulated between the Government and defendants that "Local 863, whose geographic jurisdiction encompassed northern New Jersey, was a labor organization which would, under appropriate circumstances, admit to membership persons employed by various trucking companies which transported goods and commodities between points within and without the State of New Jersey" (emphasis added)

(3/13/84, T29-25 to T29-10). It was further stipulated that all Teamster locals, including Locals 701 and 202, had similar jurisdiction over similar types of employees (truck drivers). One of the key issues in this case was whether "appropriate circumstances" existed so that Local 863 "would admit to membership" the truck drivers of FTI when it expanded its operations into New Jersey.

It was the Government's contention under the indictment that Local 863 "would admit to the membership" the truck driver employees of FTI, within the meaning of the Taft-Hartly Act, 29 U.S.C. §186(a)(2). The testimony and evidence established conclusively that Local 863 would not and could not admit to membership the driver employees of FTI.

(f) Structure of the International Brotherhood of Teamsters

The evidence demonstrated the following hierarchy of authority within the union

structure. The Constitution and By-laws of the International Brotherhood of Teamsters (hereinafter "IBT") vested supreme authority within the structure of the IBT in the International. The Constitution provided for the creation of regional Joint Councils with authority to adjudicate disputes between the local unions. The local unions were required by the Constitution to comply with the laws and orders of the Joint Councils and the International.

(g) Memorandum of Understanding Between Joint Councils 16 and 73.

Walter Shea, a Vice President of the IBT and Assistant to the International President, testified as follows. The IBT has 45 Joint Council affiliates which, under the IBT Constitution, resolve problems and disputes among local unions (A528-16 to 23). Throughout the IBT there are jurisdictional agreements between Joint Councils (A530-7 to 9). He was personally familiar with a Memorandum

of Understanding (A281) between Joint Council 16 (New York) and Joint Council 73 (northern New Jersey) which went into effect in 1961 or 1962 (A538-12 to 13), over ten years prior to FTI's location in New Jersey. The Joint Councils had agreed that if a local union under Joint Council 16 in New York had a contract with a company and that company expanded its operation or opened a new facility within the jurisidiction of Joint Council 73 in New Jersey, and the local union in New Jersey never had a contract with that company, the New York local would follow the company into New Jersey and represent its employees. The reverse was also true as to a company moving out of New Jersey and into New York. (A542-5 to 22).

Memorandums of Understanding are designed to promote stability and adjudicate jurisdictional problems (A539-25 to A540-10). Such agreements are enforceable under

the IBT Constitution and have been upheld by various judicial bodies including the courts and the National Labor Relations Board (NLRB) (A542-23 to A543-6; A546-18 to A547-8). Under the IBT Constitution violations of such agreements can result in the imposition of fines, the removal of officers of the union and loss of a union's charter, depending upon the seriousness of the offense (A546-18 to 25).

Hugh Beins, Esq., a labor law professor from Georgetown Law Center and a former trial attorney with the NLRB, offered essentially the same testimony as Mr. Shea (A562-21 to A567-8). Both Mr. Beins and Mr. Shea concluded that under the facts and circumstances of this case Local 202 had sole jurisdiction to represent the driver employees of FTI and that Local 863 was prohibited under the jurisdictional agreement to admit to membership the driver employees of FTI (A564-12 to A567-8; A544-15 to A547-15).

A third expert, Alfred Blumrosen, a professor of labor law at the Rutgers University School of Law, also concluded that the Memorandum of Understanding between Joint Councils 16 and 73 vested jurisdiction in Local 202 and precluded Local 863 from admitting to membership the driver employees of FTI (A606-5 to A607-7).

No testimony was offered in rebuttal to the substantial evidence and testimony that the Memorandum of Understanding precluded Local 863 from admitting to membership the driver employees of FTI. This uncontradicted evidence corroborated the testimony of James Paone who asserted that Local 863 could not admit these employees to membership due to the Memorandum of Understanding between Joint Councils 16 and 73 and the Constitutional mandate of the IBT (3/6/84, T38-6 to 23).

(h) NLRB Determination That Local 202 Had Jurisdiction Over FTI Truck Drivers

The binding effect and enforceability of the Memorandum of Understanding was demonstrated by the evidence presented at trial. Local 701 in New Jersey determined that it would challenge the jurisdiction of Local 202 and filed a Petition, dated March 28, 1973 with the National Labor Relations Board (hereinafter "NLRB"). Since Local 863 also had territorial interests, the NLRB notified Local 863 by letter dated April 9, 1973 (A266) of Local 701's petition. However, when the Memorandum of Understanding between Joint Councils 16 and 73 was presented by Local 202 it was determined by the Joint Councils and the NLRB that Local 202 had jurisdiction. Local 701 then withdrew its petition before the NLRB and that withdrawal was approved by an Order of the NLRB dated May 11, 1973 (A277). (24T32-9 to 21; 24T37-1 to 14).

The uncontradicted testimony at trial was that once the petition had been filed it could not merely be withdrawn by the parties without the NLRB's determination that Local 202 did in fact have sole jurisdiction (24T37-15 to 24). Consistent with the withdrawal of the petition before the NLRB and the Order of the NLRB approving that withdrawal, there was necessarily a determination by the NLRB that Local 202's contract with FTI would bar an election, or that the jurisdictional dispute should be resolved internally pursuant to the Memorandum of Understanding, and that Local 202 had jurisdiction (A570-15 to A571-8).

(i) Whether Local 863 Did Represent The Office Employees Of FTI Within The Meaning Of The Taft-Hartley Act.

The indictment alleged as an essential part of the Taft-Hartly violations that Local 863 "did represent" the office employees of FTI in violation of 29 U.S.C. §186(a). There

was no collective bargaining agreement regarding these employees. Moreover, it was uncontradicted that no negotiations were ever conducted between any representative of Local 863 and FTI. The evidence indicated that "office employees" of FTI were generally supervisors who were excepted by law and clearly could not be represented. See 29 U.S.C. §152(3). These individuals contributed dues to Local 863 solely to enable them to participate in the insurance coverage provided by that union's Welfare Fund.

The expert testimony was uncontradicted that:

(1) the term "representative" means a labor organization or an individual authorized, or purporting to be authorized, to deal with an employer on behalf of two or more of his employees concerning grievances, labor disputes, wages, rates of pay, hours of employment or other terms and conditions of work (A608-15 to 20; A578-16 to A579-14);

(2) a union and a welfare fund of the union are two separate and distinct entities as a matter of law (A575-7 to A576-5);

(3) whether one is a "representative" of employees cannot be determined by whether those employees submit membership dues to a union in order to participate in the insurance benefits of a welfare fund (A578-16 to A579-4; A607-15 to A608-3);

(4) supervisors cannot as a matter of law be represented by a union pursuant to 29 U.S.C. §153(3); and

(5) under the facts and circumstances of this case the office employees of FTI were not represented by Local 863 (A579-5 to 14; A580-7 to 17; A607-10 to A608-21). The testimony at trial indicated that Local 863 was not in any way involved in negotiating terms and conditions of employment for these employees.

(j) The taped conversation dated December 31, 1979

The trial court admitted into evidence, under the coconspirator's exception to the hearsay rule, FRE 801(d)(2)(E), a taped conversation dated December 31, 1979 between two alleged coconspirators, Fred Paone (nephew of James Paone) and Joseph Picco, and a Government informant, Anthony Carratura (21T4-18 to 21T6-3). Neither defendant was a party to this conversation. The Government produced only Carratura to testify at trial. Although both Joseph Picco and Fred Paone were identified as coconspirators (A132), the Government failed to produce either of them as witnesses and failed to prove their unavailability to testify.

In its answer to Bill of Particulars the Government acknowledged the taped conversation as an attempt by Fred Paone, Picco and Carratura to conceal wrongdoing by fashioning an untruthful story for presentation to a

State Grand Jury (A152-A153). At best, the statements were made in furtherance of a separate conspiracy to obstruct justice which was not charged in the indictment. The statements contained in the taped conversation were not referred to in the indictment and did nothing to promote the objectives of the conspiracy alleged in the indictment.

(k) Reliability Of The Participants To The Taped Conversation.

As the trial court and the Third Circuit Court of Appeals acknowledged, the admission of the taped conversation "was very damaging to the defense, since it discussed the payoff scheme and implicated James Paone" (App. A, pp.20-21; 798 F.2d at p.625). Statements made by the informant, Anthony Carratura, and found by the trial court to have been adopted by Fred Paone, were particularly prejudicial to the defense. Carratura's references in the tape to a meeting at a Newark restaurant between himself, Fred Paone and Fred Paone's

"uncle" (allegedly James Paone) linked James Paone directly to the conspiracy and these unindicted coconspirators (App. A, p.29; 798 F.2d at p.629).

The Confrontation Clause issue with respect to the admission of this taped conversation was raised before the trial court prior to the actual playing of the tape to the jury. Counsel for the defense advised the trial court and the United States Attorney that if the unindicted coconspirators such as Picco (one of the participants in the conversation) were not produced a confrontation problem would arise (A418-6 to 10; DSA57).

The reliability of the participants to the taped conversation was clearly in issue. As the trial court acknowledged, the taped conversation was orchestrated and directed by Anthony Carratura while acting in his role as a Government informant. Carratura was a

lifetime criminal and acknowledged liar who was described by the Government itself as a "low life" (3/13/84 T39-7 to 8). Carratura had acted as an informant for both the state and federal governments in hope that these authorities would forgive income tax violations for monies in excess of one million dollars. Neither the State of New Jersey nor the Federal Government had sought to confiscate these monies (12T78-20 to 12T79-11; 12T77-18 to 12T78-6; 12T79-21 to 12T83-1). In return for acting as an informant, Carratura was permitted to carry on an illegal gambling enterprise and retain the proceeds without paying any taxes on these proceeds (12T75-19 to 12T76-7). Carratura admitted that a state indictment against him had been dismissed as a result of his cooperation with authorities (2/1/84 T5-14 to T7-13; T14-1 to T14-2; T15-5 to T15-24) and indicated that it was his expectation as a

result of testifying in this action that he would not be prosecuted for the offenses allegedly committed in connection with this case (12T99-21 to 12T103-10). Carratura, who clearly had an interst in producing convictions and gathering evidence to be used by the Government, acknowledged that he had led and directed the taped conversation at the request of the Government (1/31/84 T66-5 to T68-4). Both the trial court and the Third Circuit acknowledged that the conversation had been steered by Carratura (App. A, p.29; 798 F.2d at p.629).

Reliability issues similarly existed as to the remaining participants in the taped conversation. Mr. Picco was alleged to have had a history of mental disorder. According to his counsel, Mr. Picco had been under the care of a psychiatrist from a time shortly after the occurrence of the taped conversation to the present (A30-2 to 18). Picco was

not produced at trial to ascertain what impact his alleged history may have had on the statements he made in the taped conversation. Significantly, on a portion of the taped conversation which was not played to the jury, Picco told Carratura that he did not even know James Paone.

At trial, James Paone testified that he had not spoken to Fred Paone (an alleged coconspirator) in at least ten to twelve years and described Fred Paone as a liar (3/6/84 T97-16 to 17).

Considerable questions existed regarding the reliability of the taped conversation and its participants. Despite these substantial questions, the taped conversation was admitted into evidence and played to the jury without any opportunity for the Defendants to cross-examine the only alleged coconspirator participants, Fred Paone and Joseph Picco.

Significantly, two other alleged co-conspirators, Ronald Vendetti and Eugene Wilson, appeared and testified at the trial, denied any conspiracy, and did not implicate defendants in any wrongful conduct.

REASONS FOR ALLOWANCE OF THE WRIT

POINT I

THE GOVERNMENT FAILED TO PROVE THE ELEMENTS OF THE PREDICATE OFFENSES FOR THE RICO CHARGES

The opinion below undermines the very nature, structure and hierarchy of union organization and authority in this country. A significant question is presented as to whether the Taft-Hartley Act embraces the concept that a union "would admit to membership" certain employees, and is deemed to have such a representational relationship with them, under circumstances in which the governing Constitution of the International Brotherhood of that union, and the regional Joint Councils created by that Constitution,

both of which exercise binding authority over the local unions, and the National Labor Relations Board, prohibit that union from admitting such employees to membership. The decision below answers the above question affirmatively and thereby renders a nullity the established internal mechanisms of unions for self-governance. The importance of this issue reaches well beyond the facts and circumstances of this particular case and addresses the internal structure of union authority in this country. Intervention is required by the Court to prevent the potential chaos implicated by the decision below which strikes at the heart of union attempts to maintain internal stability and peace.

The decision below also raises the issue as to whether a union or union officer "represents" an employee where that employee joins a welfare fund, separate and distinc

from the union itself, for the sole purpose of being included in the welfare fund insurance plan.

18 U.S.C. §1962(c) and (d) require that the Government prove a "pattern of racketeering activity" (predicate offenses) as an essential element of the RICO charges. The predicate offenses charged in the indictment were acts of labor bribery in violation of the Taft-Hartley Act, 29 U.S.C. §186(a) and (b). The Act makes it unlawful for an employer, such as FTI, to pay or deliver any money to any representative of his employees [29 U.S.C. §186(a)(1)], or to any labor organization, or officer thereof, which would admit to membership any of such employees [29 U.S.C. §186(a)(2)], or to any officer or employee of a labor organization engaged in an industry affecting commerce with the intent to influence him with respect to any of his actions, decisions or duties as a

representative of such a labor organization [29 U.S.C. §186(a)(4)].

The Indictment alleged that payoffs were made by FTI to James Paone "under certain circumstances in which (i) Local 863 did represent certain of the office employees of Federico Trucking and would admit to membership the driver employees of Federico Trucking and (ii) the said payments and deliveries of money ...were made with the intent on the part of the employer Federico Trucking to influence the defendant James Paone of Local 863 with respect to his actions, decisions and duties as an officer and employee thereof and as a representative of certain office employees of Federico Trucking..." (A49).

Defendants' motions for judgment of acquittal were denied by the trial court (App. D).

A. The Trial Court's Determination that Local 863 Was a Representative of the Office Employees of FTI was Contrary to This Court's Decision in United States v. Ryan, 350 U.S. 299 (1956).

The term "representative" means a labor organization or an individual authorized, or purporting to be authorized, to deal with an employer on behalf of two or more of his employees concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. United States v. Ryan, 350 U.S. 299, 306 (1956).

Neither Local 863 nor James Paone were authorized to act on behalf of office employees of FTI. The Government's evidence merely indicated that the office employees of FTI participated in the Welfare Fund of Local 863 and paid membership dues for the sole purpose of obtaining insurance coverage under the Welfare Fund's plan. The Government presented no testimony indicating that either Local 863 or James Paone in any manner was a

"representative" of these people, within the meaning of the Taft-Hartley Act.

The Third Circuit acknowledged in its opinion that the only testimony regarding this subject was that Local 863 never represented the office employees with respect to the terms and conditions of employment and that the union and its welfare fund were two distinct entities (App. A, p.7; 798 F.2d at p.619). The Third Circuit also found that Local 863 never negotiated a collective bargaining agreement for the office employees. When these individuals transferred to another health plan, it was administered by the Travelers Insurance Co. Under the reasoning of the trial court and the Court of Appeals the Travelers Insurance Company would qualify as a "representative" of the office employees. This actual example from the evidence demonstrates the absurdity of the determination that representation existed

merely by virtue of the office employees' inclusion in the insurance plan.

In Ryan this Court analyzed the legislative history of the Taft-Hartley Act as it related to the term "representative." It noted that the term had been defined in the Senate bill as follows:

> For the purpose of this section, the term "representative" means any labor organization which, or any individual who, is authorized or purports to be authorized to deal with an employer, on behalf of two or more of his employees, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

350 U.S. at 306, n.6. This Court stated that the above definition was modified by the final bill only as part of "minor clarifying changes," and concluded that the Senate bill definition remained essentially intact (350 U.S. at 306).

The Government in this case presented no evidence as to what the term "representative" means in the Taft-Hartley context. The

defendants presented two highly respected experts in the field of labor law whose testimony was unrefuted. Consistent with the teaching of United States v. Ryan, supra, these expert witnesses testified that the term "representative" means one who represents employees in negotiations with the employer regarding grievances, hours, wages or other terms and conditions of employment (A608-15 to 20; A578-16 to A579-14). The experts were given a hypothetical factual situation based on the uncontradicted facts of this case and they opined that neither Local 863 nor James Paone was a "representative" of FTI office employees within the meaning of that term in the Taft-Hartley Act (A578-8 to A579-14). This is not to say that a "representative" must be the exclusive bargaining agent for the employees. However, where one has no authority whatsoever to act on behalf of employees concerning grievances,

labor disputes, wages, rates of pay, hours of employment or conditions of work, he does not fit the mold of a "representative".

The Third Circuit noted that the definition of representative contained in the Senate's proposed bill, as set forth in footnote 6 of the Ryan opinion, was not the definition that was ultimately adopted. The reference now found in 29 U.S.C. §152(4) says: "The term 'representative' includes any individual or labor organization." (App. A, p.8; 798 F.2d at p.620). This is not a pure definition but merely advises what the term "representative" includes. The purpose of this statement was to assure that the statute prohibited payments not only to the labor organization, as an entity, but also to individual officers or other representatives of the union. That was the essence of the Ryan opinion. The Third Circuit's reliance on this reference as a true definition of the

term "representative" is therefore misleading.

The opinion of the Third Circuit failed to consider that this Court in Ryan stated that the Senate bill definition set out in fn.6 of the Ryan opinion remained essentially intact. The Third Circuit states that Ryan imposes no limitations on the subject matter of the representation. Thus, the Third Circuit concludes that such representation took place in this case, "even assuming that the only subject matter of the relationship was the inclusion of the employees in Local 863's [Welfare] fund" (App. A, pp. 8-9; 798 F.2d at p.620). The Third Circuit acknowledged (App. A, p.7; 798 F.2d at p.619), but failed to properly consider and weigh, that the union and the Welfare Fund are, as a matter of law, two totally separate and distinct entities. See Lewis v. Benedict Coal Corporation, 361 U.S. 459, 466 (1960).

Although no true definition of the term "representative" appears in the adopted statute, this Court's analysis of that term in Ryan is consistent with the position of the defendants herein, and inconsistent with the opinion below. It is respectfully requested that this Court intervene in order to correct the erroneous interpretation contained in the opinion of the Third Circuit. Clarification of the meaning of "representative" is required in order to define the limits of that term and to insure a fair and intended application of the Taft-Hartley Act.

B. Local 863 Would Not Admit To Membership The Driver Employees of FTI.

The indictment alleges that Local 863 "would admit to membership the driver employees of Federico Trucking" [29 U.S.C. §186(a)(2)]. Local 863 was a party to a Memorandum of Understanding between Joint

Council 73 (Northern New Jersey) and Joint Council 16 (New York) of the IBT which went into effect in 1961 or 1962 (A538-12 to 13). The Joint Councils had agreed that if a local union under Joint Council 16 in New York had a contract with a company and that company expanded its operation within the jurisdiction of Joint Council 73 in New Jersey, and the local union in New Jersey never had a contract with that company, the New York local would follow the company into New Jersey and represent its employees (A542-5 to 22). This long-standing Memorandum of Understanding had been executed in order to promote labor peace and prevent internal strife within the IBT (A539-25 to A540-10).

Despite the uncontroverted testimony and evidence (see pp.3-11, infra), the trial court found that Local 863 "would admit to membership" the driver employees of FTI. The IBT Constitution requires that joint councils

resolve jurisdictional disputes among local unions. In this case, Joint Council 73 determined that a long-standing Memorandum of Understanding between Joint Councils 73 and 16 required that Local 202 continue its pre-existing jurisdiction over these drivers. The Memorandum of Understanding and the determination by Joint Council 73, as confirmed by the order of the NLRB, factually and legally precluded Local 863 from admitting the driver employees of FTI to membership. Therefore, there would not have been, as a practical matter, any reason for a payoff to Local 863 or James Paone. Local 202 conducted all negotiations for these employees in accordance with its valid contract. It is significant that the opinion of the Third Circuit completely ignored the relevant NLRB determination on the merits.

Both the trial court and the Third Circuit held that it was enough to show that

Local 863 would have admitted such employees to membership, "if it could have" (App. A, p.12; 798 F.2d at pp.621-622). This "would if it could" approach essentially eliminated any obstacles to the Government's proofs. One cannot think of any union which wouldn't admit employees to membership "if it could." Surely, Congress required more than such a tenuous relationship to satisfy the "would admit to membership" requirement.

The phrase "would admit to membership" does not mean any indefinite, uncertain, future, vague possibility. See United States v. Sink, 355 F.Supp. 1067, 1071 (E.D. Pa. 1973), aff'd. 485 F.2d 683 (3d Cir. 1973); United States v. Cody, 722 F.2d 1052, 1058-1059 (2d Cir. 1983), cert denied. ____ U.S. ____, 104 S.Ct. 2678 (1984). In its opinion, the Third Circuit attempted to distinguish the Sink and Cody situations from the present. The Court of Appeals stated

that in Sink a union representative received a gift from an employer who, although actively contemplating expansion into the union's jurisidction, had not yet done so. The Court said that in Cody the employer did not have a contract with a local union, did not employ local members and, at the time of the "gifts" to the union official, the employer had no actual plans to commence a project that would have required the hiring of local members (see App. A, pp.17-18); 798 F.2d at pp.623-624). It is difficult to understand in principle the distinction between those cases and the present one where Local 863 was barred as a matter of law from seeking to admit the employees of FTI to membership. Assuming arguendo the illegal payments were made, there must be a meaningful nexus between those payments and the labor law violations alleged in the indictment. The Court in Cody found that the

gift in question in that case "did not spring entirely from the kindness of [the employer's] heart", and surmised that perhaps it was meant to obtain future good will from the union representative, but that this connection was too vague and uncertain to form a basis for a Taft-Hartley criminal charge. Like reasoning applies with more force in this case. Local 863 was barred by law from seeking to represent these drivers, and stood to incur substantial penalties, including the loss of its charter, for interfering with the FTI-Local 202 relationship (A546-18 to 25). This accounts for the remoteness of any cognizable labor relationship between Local 863 and the FTI drivers.

The Third Circuit states that defendants' position "would seem to render the 'would admit to membership' statutory language superfluous, since sec. 302(a)(2) [29 U.S.C. §186(a)(2)] also prohibits pay-

ments to officers of a labor organization which 'seeks to represent' a group of employees, language more suited to the 'present intention' situation than the phrase at issue here." (App. A, p.13; 798 F.2d at p.622).

This reasoning is erroneous. The Court of Appeals failed to acknowledge the uncontradicted evidence that Local 863 was bound, under penalties of loss of charter or substantial fines, or both, and that James Paone was bound under penalty of losing his status as a union officer, to abide by the governing Memorandum of Understanding, the determination of the Joint Councils and the order of the NLRB, all of which had the force of law. The term "would admit to membership," reasonably interpreted, must mean something more than existed in this case. At least there must exist some authority, or readily potential authority, to admit the employees

to membership, not some vague and indefinite "long-shot" possibility. Clearly, the "would admit to membership" requirement cannot apply to the situation that exists here where Local 863 was barred by law from representation.

The opinion below in effect negates the very essence of the authoritative hierarchy within the IBT. Intervention by the Court is required in order to maintain the internal mechanisms established by the unions to stabilize the unions and prevent internal strife.

The Third Circuit essentially says that Local 863 would admit employees to membership, if it could, even though it may not - and this is enough to establish the "would admit to membership" requirement. It is submitted that such mental gymnastics is a stretch of the intellect beyond anything contemplated by Congress when it enacted the Taft-Hartley Act.

C. Alleged Payments And Deliveries Of Money Or Things Of Value Were Not Made With the Intent On The Part Of FTI To Influence James Paone Within The Meaning of 29 U.S.C §186(a)(4).

The indictment in this case charged that payments of money and other things of value were made by FTI with the intent to influence James Paone as an officer and employee of Local 863 and as representative of certain office employees of FTI in violation of 29 U.S.C. §186(a)(4). The Government's contentions under 29 U.S.C. §186(a)(4) were identical to the contentions made under §186(a)(2) ("would admit to membership"). The arguments made above are therefore incorporated herein.

This Court has found that the purpose of the Taft-Hartley Act is limited to dealing with "problems peculiar to collective bargaining." Arroyo v. United States, 359 U.S. 419, 424-425 (1959). The federal courts have found that §186(a) and (b) of the Taft-

Hartley Act are intended to prohibit the payment and receipt of money or other things of value with the intent to influence an individual's behavior as a representative of employees. United States v. Lanni, 466 F.2d 1102, 1108 (3rd Cir. 1972). Clearly, the scope of §186(a)(4) is limited to acts committed with the intent to affect the collective bargaining process.

No evidence was presented at trial to find that FTI intended to influence James Paone with respect to his actions or duties as a union officer and as a representative of FTI office employees. As set forth above, no basis existed for finding that (a) James Paone represented any FTI office employees within the meaning of the Taft-Hartley act, or (b) Local 863 would or could admit the driver employees of FTI to membership within the meaning of the Taft-Hartley Act. The alleged payment of money or any other thing

of value by FTI to James Paone cannot be found to have been intended to affect the collective bargaining process, or to have caused Mr. Paone to do or refrain from doing anything in a representative capacity. No basis existed for finding that any alleged payments of money or other things of value by FTI were made with the intent to influence James Paone within the meaning of the Taft-Hartley Act.

A reading of the record as a whole in this case leads to only one conclusion: insufficient evidence existed to withstand the Defendants' motion for judgment of acquittal brought pursuant to Fed.R.Crim.Pro. 29. The trial court's failure to grant the Defendants' motion for acquittal constituted reversible error.

It is submitted that the Third Circuit's interpretation of the Taft-Hartley Act sweeps too broadly, especially as applied to the

facts and circumstances in this case. Research indicates no decisions by this Court which directly address the issues presented here. Direction is required by this Court in order to provide guidance to the trial courts as well as the circuit courts in defining the terms "representative" and "would admit to membership" within the context of the Taft-Hartley Act.

POINT II

THE OPINION BELOW THAT HEARSAY STATEMENTS CONTAINED IN A CRITICAL TAPED CONVERSATION WERE MADE IN FURTHERANCE OF THE ALLEGED CONSPIRACY AND WERE THEREBY ADMISSIBLE IS CONTRARY TO PRIOR LANDMARK DECISIONS OF THIS COURT.

The opinion of the Third Circuit affirmed the trial court's determination that the critical taped conversation of December 31, 1979 was made "in furtherance of the conspiracy". FRE 801(d)(2)(E) provides that a statement is not hearsay (and is therefore admissible) if it is offered against a party and is "a statement by a co-conspirator of a

party during the course and in furtherance of the conspiracy."

The opinion below expressly states that the Third Circuit will continue to interpret the "in furtherance" requirement broadly (App. A, p.32; 798 F.2d at pp.630-631) rather than narrowly, as expressly required by prior opinions of this Court.

In Krulewitch v. United States, 336 U.S. 440 (1949), this Court noted that FRE 801(d)(2)(E) was a "narrow exception to the hearsay rule" and should not be unduly expanded (336 U.S. at 443-444; emphasis added). The Court rejected the Government's attempt "to expand this narrow exception to the hearsay rule and hold admissible a declaration, not made in furtherance of the alleged criminal ... conspiracy charged, but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment..." (emphasis added;

Id. at 444). In Grunewald v. United States, 353 U.S. 391, 404 (1957) this Court refused to find that a discussion regarding concealment was admissible, and noted that this Court had repeatedly warned that it would "view with disfavor attempts to broaden the already pervasive and wide sweeping nets of conspiracy prosecutions."

The Government in this case introduced the critical taped conversation between Fred Paone, Anthony Carratura and Joseph Picco as evidence. Neither one of the defendants was a party to this conversation. According to the indictment, Joseph Picco was a "no-show" employee of FTI who received salary checks between December, 1972 and August, 1974 (A43), five years and four months prior to the December 31, 1979 conversation. Carratura was also an alleged "no show" employee of FTI who received salary checks from September, 1974 to July, 1977, two years

and five months prior to the December 31, 1979 conversation (A43). No other conduct of these individuals is alleged in the indictment as part of the RICO conspiracy. Fred Paone was involved in the alleged conspiracy as a "middleman" until, at the latest, July, 1977, two years and five months prior to the December 31, 1979 conversation. A151-A152).

The indictment charges that the defendants conspired to participate in the conduct of the affairs of FTI through a pattern of racketeering activity in violation of 29 U.S.C.A. §186. All of the overt acts in the indictment relate to this alleged scheme whereby payroll checks, payable to "no-show" employees of FTI, were cashed and the proceeds allegedly passed to James Paone (A43-A48).

Neither the Indictment nor the Government's Answer to Bill of Particulars alleges that the December 31, 1979 conversa-

tion was part of this RICO conspiracy (A43-A48). It is not mentioned anywhere in the indictment, either as an overt act, a means of the conspiracy or a "racketeering act". The Government contended at trial that on December 31, 1979 Fred Paone, Picco and Carratura met, not for the purpose of fulfilling the objectives of the conspiracy alleged in the indictment, but in order to devise "a method of giving false testimony should a grand jury inquiry begin into no-show jobs at Federico [FTI]." See Bill of Particulars at A132. Therefore, the taped conversation was not in furtherance of the main objective of the conspiracy.

This Court has traditionally held that a co-conspirator's statements relating to concealment of the main conspiracy, but which are not calculated to promote the objective of the main conspiracy, do not constitute a part of the main conspiracy so as to permit

the admission of such statements under FRE 801(d)(2)(E). See Grunewald v. United States, supra; Lutwak v. United States, 344 U.S. 604 (1953) and Krulewitch v. United States, supra.

In Grunewald v. United States, supra, this Court said:

> "...Acts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial ageement among the conspirators. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world..."

353 U.S. at 403.

Rejecting the argument that co-defendant's attempt to influence his secretary not to talk to the grand jury was admissible as a statement or conduct of a co-conspirator, this Court said:

> "The essential missing element is a showing that the act was done in furtherance of a prior criminal agreement among the conspirators."

353 U.S. at 404, n.16.

Likewise, in the present case, a State Grand Jury proceeding which allegedly was to take place in 1979-80 surely was not contemplated as part of the original conspiratorial agreement which began in 1972. The taped conversation of December 31, 1979 was not intended to further the RICO conspiracy alleged in the indictment, nor was it part of this initial conspiratorial agreement. Moreover, the participants in this conversation were removed from the conspiracy for a number of years, as clearly acknowledged in the indictment and the Government's Answer to Bill of Particulars.

The Government and the opinion below appear to concur in the theory that if the conspiracy is ongoing, attempts to conceal it from authorities are per se "in furtherance" of the main conspiracy. This theory that there is an "implied conspiracy" to conceal,

inherent in any criminal conspiracy, has no support in this Court's prior opinions.

The concurring opinion of Justice Jackson in the Krulewitch case is enlightening:

> I suppose no person planning a crime would accept as a collaborator one on whom he thought he could not rely for help if he were caught, but I doubt that this fact warrants an inference of conspiracy for that purpose...
>
> It is difficult to see any logical limit to the "implied conspiracy", either as to duration or means...On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by another's unauthorized and unknown commission of perjury, bribery of a juror or witness, [etc.]...

336 U.S. at 455-456.

The above language was adopted by this Court in Grunewald (353 U.S. at 400-401). This Court perceived the very danger which presents itself in this case. James Paone and Thomas Pecora are being held responsible for the statements of alleged co-conspirators relating to a cover-up when they neither

authorized the statements, nor were parties to the conversation. The conversation took place approximately seven years after the alleged conspiracy was initiated, and several years after any active involvement by the alleged co-conspirators. Such a broadening of the term "in furtherance" is totally inconsistent with the expressed rationale of this Court.

This Court has continually refused to broaden the "in furtherance" exception. Nevertheless the court below in its opinion noted that the "in furtherance" exception "is usually given a broad interpretation" by the Third Circuit. See App. A, p.32, 798 F.2d at pp.630-631, citing with approval United States v. Gibbs, 739 F.2d 838, 845 (3rd Cir. 1984) (in banc), cert den. 105 S.Ct. 779 (1985).

In United States v. Howard, 752 F.2d 220 (6th Cir. 1985), cert. denied sub nom,

Shelton v. United States, ___ U.S. ___, 105 S.Ct. 3506 (1985), defendants were charged with conspiracy to defraud an insurance company by arson. The Government introduced taped conversations under FRE 801(d)(2)(E) relating to the concealment of the fraud from the police. The Court found that although the statements were made during the course of the conspiracy they were not in furtherance of the conspiracy (752 F.2d at 229-231) and reversed defendant's conviction:

> Although we conclude that the recorded conversations took place during the conspiracy, we cannot find that the statements were made in furtherance of the conspiracy. The statements did nothing to advance what we have determined to be the remaining objective of the conspiracy, which was to obtain the insurance proceeds...

(752 F.2d at 230).

In Howard, as in this case, the Government argued that statements contained in the taped conversations were directed at avoiding detection and thereby promoted the

objectives of, and were in furtherance of, the main conspiracy. The Court in Howard responded:

> ...Detection of a continuing illegal conspiracy will always thwart any remaining objectives of the conspiracy. Thus, to accept the Government's position before this Court would be to hold that statements directed at avoiding detection are admissible any time that the conspiracy is continuing. The rule enunciated in Krulewitch, that avoiding detection is not necessarily a part of the main conspiracy, cannot be construed so narrowly...

(Id.). Like reasoning applies in this case. The taped conversation related solely to avoiding detection by prosecutorial authorities. The declarants were not discussing details of their no-show jobs in order to further the objectives of the main conspiracy. Instead, they were discussing what testimony they would give before a state grand jury in order to conceal their past conduct (A234). Moreover, no grand jury proceeding ever took place. Thus, the Third Circuit's rationale that the concealment of

the existence of the conspiracy enabled the defendants to continue their illegal payoff scheme for two more years is factually and legally is erroneous. (See App. A, p.32; 798 F.2d at pp.630-631).

The Eighth Circuit Court of Appeals recently rejected the broad approach to the "in furtherance" requirement espoused by the Government, not only in that case, but apparently as a matter of general policy. See United States v. Urbanik, __ F.2d. __, 40 CrL 2029 (4th Cir., decided 9/23/86). In Urbanik the Court noted that, as in this case, "the government argues that we should construe the "in furtherance" requirement of Rule 801(d)(2)(E) broadly." The Court rejected the "broad" construction urged by the government, and found that the statement in question, made during the course of the conspiracy, "touches upon, [but] does not 'further' a conspiracy." Like reasoning applies in this case.

The opinion below distinugishes Grunewald, Krulewitch, and Lutwak by stating that those cases are limited to statements made after the conspiracy has ended or after the objectives of the conspiracy had either failed or been achieved. Nevertheless, the principles set forth in those cases are applicable to the facts of this case. To stretch the "in furtherance" exception in this case, so as to allow the introduction into evidence of the hearsay statements contained in the taped conversation of December 31, 1979, was directly contrary to the strict and narrow approach to the "in furtherance" requirement espoused by this Court in Lutwak, Grunewald and Krulewitch.

In Brooks, "Evidence," 14 Rutgers L. Rev. 390, 407-411 (1960), where the author notes that the "in furtherance" requirement has been "whittled away" in various jurisdictions and condemns the practice in many

courts which pay only lip service to this requirement as long as the proffered statement is made during the course of the conspiracy. Such practice requires corrective action by this Court to protect defendants' Confrontation Rights under the Sixth Amendment which are being "whittled away" not only in the Third Circuit but in other jurisdictions in this country.

This Court's narrow approach to the "in furtherance" requirement will be undermined by the Third Circuit's expressed intention to broadly interpret and apply the "in furtherance" requirement. This conflict must be corrected in order to promote a uniform and even-handed application of FRE 801(d)(2)(E).

POINT III
ADMISSION OF THE DECEMBER 31, 1979 TAPED CONVERSATION INTO EVIDENCE VIOLATED THE DEFENDANTS' SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST THEM

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal

prosecutions the accused shall enjoy the right to . . . be confronted with the witnesses against him" (U.S.C.A. Const. Amend. 6). This Court has held that the Sixth Amendment right to confrontation includes the right to cross-examine and to have the jury weigh the demeanor of the witnesses. Barber v. Page, 390 U.S. 719,725 (1968). This Court has further held that the Confrontation Clause often works to restrict the admission of out of court statements which would otherwise be admissible under the hearsay rule and its exceptions. See Ohio v. Roberts, 448 U.S. 56,65 (1980); California v. Green, 399 U.S. 149, 155-156 (1970).

In this Court's recent decision in United States v. Inadi, 474 U.S. ____, 106 S.Ct. ____, 39 L.Ed 2d 390 (1986), the issue before the Court was whether the Confrontation Clause requires the Government to show that a nontestifying coconspirator is

unavailable to testify, as a condition for the admission of that coconspirator's out-of-court statements under the coconspirator's exception to the hearsay rule [FRE 801(d)(2)(E)]. In that decision this Court declined to find that the Confrontation Clause required the Government to prove a declarant unavailable as a prerequisite to the admission of the declarant's out-of-court statement under the coconspirator's exception. 474 U.S. at ____, 896 L.Ed. 2d at 402. This Court, however, qualified its holding when it noted that "the reliability of the out-of-court statements is not an issue in this case" and thus left open the issue of whether or not the Confrontation Clause requires a showing that the out-of-court statements of a coconspirator are reliable before those statements can be admitted under the coconspirator's exception to the hearsay rule. 474 U.S. at ___, 89 L.Ed.2d at 396 n.3.

The present case differs from Inadi since the reliability of the out-of-court statements was subject to substantial question during the course of the trial below. Unlike Inadi where the taped conversations consisted of five telephone conversations intercepted by the Government without the knowledge of any of the participants, the taped conversation in this case was orchestrated and directed by Carratura in his role as a Government informant. Unlike Inadi, where the defendant was a participant in several of the conversations which were challenged, neither of the Defendents in this action was a party to the taped conversation. Rather, the conversation here was between two alleged, unindicted coconspirators and the Government informant.

The trial court admitted the taped conversation against both Defendants as coconspirators' statements under FRE 801(d)(2)(E).

The only person produced by the Government to testify regarding this conversation was the informant, Carratura. Mr. Carratura testified at trial that he had never met Thomas Pecora (2/12/84, T109-23 to T111-13) and that he had met James Paone only once (1/31/84, T12-18 to 21). The existence of any meeting was vigorously contested by James Paone (DSA 192-7 to 9).[3] Carratura had a substantial personal and financial interest in producing convictions and gathering evidence to be used by the Government. (See pp.18-19, infra). This significant need by a participant in the conversation to direct and interpret the conversation in a manner adverse to defendants and the truth was not present in Inadi.

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[3] Evidence discovered subsequent to trial indicated that this meeting could not have taken place at the time alleged by Mr. Carratura, thereby substantiating Mr. Paone's testimony at trial. A motion for new trial based on this evidence was denied by the trial court on the grounds that the such evidence could have been discovered prior to trial (A103).

The reliab ity of Picco and Fred Paone, the only other participants in the conversation, was also sharply in issue. Picco was alleged to have been suffering from a mental disorder and, according to his attorney, was under the care of a psychiatrist beginning shortly after the taped conversation (A30-2 to 18). In contradiction to the Government's theory of Fred Paone's connection to the conspiracy, James Paone testified that he had not spoken to Fred Paone in at least ten to twelve years (3/6/84, T97-16 to 17).

As set forth above, substantial questions of reliability and truthfulness existed at trial as to the declarations contained in the taped conversation. The trial court admitted the taped conversation into evidence under the coconspirator's exception to the hearsay rule without requiring any showing of reliability by the Government. As neither of the alleged coconspirators whose statements

were contained in the taped conversation were produced by the Government at trial, the admission of the taped conversation without the establishment of the reliability of the statements contained within it violated the Defendants' Sixth Amendment right to confront the witnesses against them.

In rendering its decision in the present case, the Third Circuit improperly interpreted this Court's decision in Inadi. The Third Circuit found that the decision in Inadi precluded the Government's obligation to demonstrate unavailability under any facts and circumstances relating to the admission of evidence under the coconspirator's exception (App. A, p.25; 798 F.2d at p.627). It is submitted, however, that Inadi holds that unavailabity need not be shown, where reliability is not an issue, in order to admit out-of-court statements under the coconspirator's exception. However, where

reliabilty of a coconspirator's statement is in issue, Inadi does not preclude the requirement that the Government produce the declarant or demonstate his unavailability.

In the present case, in light of the substantial issues as to the reliability of the statements contained in the taped conversation, it was error for the trial court to admit the taped conversation without requiring the Government to produce the declarants or demonstrate their unavailability. The admission of the taped conversation violated the Defendants' Sixth Amendment right to confrontation. Since the taped conversation was very damaging to the defense (App. A, pp. 20-21; 798 F.2d at p.625) the improper admission of the taped conversation substantially prejudiced the Defendants in their right to a fair trial.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that the Petition for Certioriari be granted.

Respectfully submitted;

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Dated: October 16, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5698 & 85-5386

UNITED STATES OF AMERICA

Appellee

v.

THOMAS PECORA

JAMES PAONE

Appellants

Thomas Pecora, Appellant in No. 84-5698
James Paone, Appellant in No. 85-5386

Appeal from the United States District Court
for the District of New Jersey
(Crim. 82-00233-02 & 82-0023-01)

Argued: Sept. 12, 1985
Assigned: April 18, 1986

Before: SEITZ, BECKER, and ROSENN,
Circuit Judges.

(Opinion filed: July 2, 1986)

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OPINION OF THE COURT

SEITZ, *Circuit Judge.*

I.

The defendants, James Paone and Thomas Pecora, appeal judgments of conviction against them in the district court on two counts of violating the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961 et seq. We have jurisdiction under 28 U.S.C. § 1291.

II.

The defendants were convicted by a jury of violations of both sections 1962(c) and (d) of RICO, which make it unlawful to conduct (section 1962(c)), or to conspire to conduct (section 1962(d)), an enterprise through a pattern of racketeering activity. Defendant Pecora, general manager of Federico Trucking, Inc. (FTI),[1] was charged with making payments, mainly in

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1. Biagio Federico, owner and president of FTI, was originally a codefendant. He was severed from this trial due to illness.

the form of salaries "paid" to a succession of no-show employees over the course of a decade, to defendant Paone, business agent and recording secretary of Local 863 of the International Brotherhood of Teamsters. These payments were allegedly the product of a conspiracy including Paone and Pecora, and were intended to influence Paone in the conduct of the business of Local 863. The jury found that the payments violated sections 302(a) and (b) of the Taft-Hartley Act, ch. 120, 61 Stat. 157 (1947), *as amended by* section 505 of the Labor-Management Reporting and Disclosure Act, Pub. L. 86-257, 73 Stat. 537 (1959), *codified at* 29 U.S.C. § 186(a) and (b). The Taft-Hartley violations formed the predicate acts required to establish a "pattern of racketeering activity" under 18 U.S.C. § 1961(1)(c).

On appeal, the defendants raise a multitude of issues which they argue warrant reversal of their convictions. To avoid repetition, we will discuss in detail below the facts pertinent to each issue, and content ourselves with a cursory sketch of the general scheme here. We describe the facts in the light most favorable to the government.

FTI, a corporation doing business in New Jersey, was established in 1972, and entered into a contract with Foodhaulers Inc., a subsidiary of Wakefern Food Corp., whereby Foodhaulers subcontracted its delivery of bakery products for Wakefern to FTI. Truckdrivers employed directly by Foodhaulers were represented by Local 863. FTI was wholly owned by Biagio Federico, who also owned S. Federico Trucking in New York. S. Federico had a longstanding union relationship with Teamsters Local 202. When FTI was established, a jurisdictional dispute arose among several locals including 863 and 202 as to which Teamsters local would represent FTI employees. The dispute was

considered by the New York and New Jersey Joint Councils of the Teamsters, and apparently resolved pursuant to a 1963 Memorandum of Understanding between the those Councils to allow Local 202 to follow the work and represent the FTI drivers.

The relationship between Foodhaulers and the FTI drivers, however, bore many of the indicia of an employer/employee relationship. For example, Foodhaulers accepted the applications of FTI drivers, required them to have medical examinations, administered driving tests to them, issued them identification cards, and had the power to fire them.

The government claimed that FTI in the persons of Pecora and Biagio Federico conspired with Paone to funnel payments to him in order to prevent Local 863 from asserting that the subcontract was a sham intended to allow Foodhaulers to hire non-863 drivers in violation of its collective bargaining agreement, an assertion that could have interfered with FTI's subcontract. Paone would therefore use his influence as a high official in Local 863 to ensure that Local 863 would neither object to the subcontract or attempt to assert jurisdiction over FTI's driver employees.

From 1972 to 1981, a number of no-show employees were paid salaries, which were routed to Paone through middlemen. By 1981, the payments totalled approximately $235,000. In addition, FTI made several thousand dollars in welfare fund contributions on behalf of Paone's sister, despite the fact that she was never employed by FTI.

After the jury found the defendants guilty of both RICO counts, the district court denied motions for a judgment of acquittal under Federal Rule of Criminal Procedure 29, and motions for a new trial based on trial error and newly discovered evidence under F. R. Crim. P. 33. This appeal followed.

III.

The defendants contend that the district court erred in denying their motions for a judgment of acquittal because, on the facts presented to the jury, there was insufficient evidence as a matter of law to find that they had violated sections 302(a) and (b) of the Taft-Hartley Act, 29 U.S.C. §§ 186(a) and (b). In reviewing the district court's denial of defendants' motions, we determine whether there is substantial evidence, viewed in the light most favorable to the government, to support a jury's finding of guilt beyond a reasonable doubt as to the elements of the crime charged. *Government of the Virgin Islands v. Williams*, 739 F.2d 936, 940 (3d Cir. 1984). The government must be given the benefit of inferences that may be drawn from the evidence, and the evidence may be considered probative even if it is circumstantial. *Id.* In addition, "'[t]he evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt.'" *Id., quoting United States v. Allard*, 240 F.2d 840, 841 (3d Cir.), *cert. denied*, 353 U.S. 939 (1957). Of course, to the extent we must review the district court's statutory interpretations or other decisions on matters of law, our review is plenary.

Section 302(a) makes it:

> (a) ... unlawful for any employer ... or any person who acts in the interest of an employer to pay, lend, or deliver, or agree to pay lend, or deliver, any money or other thing of value--
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> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
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> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to

> represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
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> ...
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of such labor organization.

Section 302(b) makes it "unlawful for any person to request, demand, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)."

The essence of the defendants' arguments is that, under the facts, Paone was not a "representative" of FTI employees, that circumstances prevented Local 863 from admitting FTI employees to membership, and that payments to Paone could not have been made with intent to influence him in his capacity as an official of Local 863. Payments in violation of any one of the subsections of section 302(a), of course, would suffice to make out a Taft-Hartley violation. We are therefore called upon to construe the language of section 302 to see whether the facts here fall within its scope. We will take up each subsection in turn.

A.

The facts relevant to section 302(a)(2) are not complex. First, a number of FTI's office employees were dues paying members of Local 863. Some of those employees were supervisory personnel and we will assume that they could not be represented by the Local under the National Labor Relations Act. However, other employees who were Local 863 members were clerical, non-supervisory personnel. The defendants maintained at trial that the office employees paid dues

to the union for the sole purpose of participating in the insurance program operated under Local 863's welfare fund, and therefore that Local 863 was not their representative within the meaning of section 302.

At least one office employee testified that Local 863 never represented him with respect to the terms and conditions of employment, and there was testimony to the effect that a union and its welfare fund are two distinct entities. Local 863 never negotiated a collective bargaining agreement for the office employees. When the office employees transferred to another health plan, they were put on Local 863's withdrawal rolls.

The seminal case construing the term "representative" is *United States v. Ryan*, 350 U.S. 299 (1956). In *Ryan*, the petitioner argued for a very restrictive interpretation, but the court held that "a narrow reading of the term 'representative' would substantially defeat the Congressional purpose." 350 U.S. at 304.

Ryan did not purport to define the *outer* limits of the scope of the term "representative", but instead stressed its breadth. The Court noted that a narrow reading of the statute would prevent applying section 302 to "other individuals as trustees [of welfare funds]," 350 U.S. at 305, and that Congress had "enlarged [the scope of section 302 to] reach ... a 'case where the union representative is shaking down the employer.'" 350 U.S. at 306, *quoting* Senator Taft.

The defendants contend that *Ryan* stands for the proposition that dues paying members of a union local are not represented by that union's officers if the purpose of their membership is simply participation in the union's welfare fund. They would have us adopt the following language from *Ryan*: "'For purposes of this section [§ 302 of Taft-Hartley], the term 'representative' means any labor organization which, or any individual who, is authorized or purports to be authorized to deal

with an employer ... concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.'" *Ryan*, 350 U.S. at 306, n.6, *quoting* section 302(g) of the Senate version of section 302.

Ryan does not support such a reading of section 302, however.[2] The Senate's proposed definition was omitted from the final version of section 302. Instead, Congress adopted by reference in section 501(3) of Taft-Hartley the definition of representative found in section 2(4) of the National Labor Relations Act, 29 U.S.C. § 152(4): "The term 'representative' includes any individual or labor organization." The NLRA's language is considerably broader than the definition that was deleted. *See Ryan*, 350 U.S. at 301. While the Court made it clear that section 302 covers at least the scope of proposed section 302(g), it concluded with the broad statement "that § 302 prohibits payments by employers to individuals who represent employees in their relations with the employers." 350 U.S. at 307. *Ryan* thus imposes no limitation on the subject matter of the representation.

With respect to the FTI employees who were members of Local 863, then, we must decide whether the jury could find that Local 863 represented them in their relations with FTI, even assuming that the only subject matter of the relationship was the inclusion of

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2. Defendants presented two labor law professors as expert witnesses. Both testified with respect to the definition of representative and whether Local 863 was such a representative. Defendants now point to this "uncontradicted" testimony as conclusive on the meanings of various terms in section 302. Of course, the opinions of witnesses on matters of law or on questions of ultimate fact, to the extent they depend on legal issues, are binding neither on this court, nor on the district court.

the employees in Local 863's pension fund. The district judge instructed the jury that the fact that the office employees were members of Local 863 was not dispositive and he told them that they might consider the payment of dues, the lack of a collective bargaining agreement, and other factors in their decision.

The district court's instructions were consistent with the case law interpreting section 302. In *Mechanical Contractors Ass'n v. Local Union 420*, 265 F.2d 607, 611 (3d Cir. 1959), we held that persons designated by a union to administer a fund derived from employer contributions were representatives within the meaning of section 302, even where none of the fund's purposes included collective bargaining for the employees or representation on the job or in grievances. We rejected the contention that section 302's applicability depended on the "character of the functions performed by the joint administrators." 265 F.2d at 611. Thus, even if FTI's office employees belonged to Local 863 for the sole purpose of participation in the welfare fund, Local 863 and its officers would be "representatives" within the scope of section 302. *See also Sheet Metal Contractors Ass'n v. Sheet Metal Workers International Union*, 248 F.2d 307, 315 (9th Cir. 1957), *cert. denied*, 355 U.S. 924 (1958).

Further, participation in an insurance program itself may be considered a part of the wage package given to employees sufficient to make union officials with no other connection to the workers involved representatives within the meaning of section 302. *See Sheet Metal Contractors Ass'n*, 248 F.2d at 314 (2 1/2 cents per hour welfare fund contributions sought by Local 74 for Local 104 workers working temporarily in its jurisdiction were "on behalf of ... members of Local 104 temporarily in the northern counties and in respect to the working conditions and wage scales of ...

104 members;" thus, joint board members of Local 74 could be considered representatives).

When employees participate in a welfare fund, there must be some determination of the amount of the contributions on their behalf, the mechanics of payment, the claims procedure, the means by which claims disputes are resolved, and so on. There is no need under the statute to show that the union officials actually negotiated or personally handled the amount of the payments to the welfare fund, the extent of the benefits package available through the fund, or the award of benefits. The term representative

> 'includes any person who is empowered, authorized, or designated in any way, directly or indirectly, by any employee or employees, to represent such employee or employees in any matter relating to their wages or hours or working conditions .. in any responsible dealing with the employer involving such matters. If a person be so authorized to act it is not necessary that he actually exercise all or any of the powers conferred upon him.'

Brennan v. United States, 240 F.2d 253, 264 (8th Cir.), *cert. denied*, 353 U.S. 931 (1957) (quoting and adopting the district court's jury charge). It is also not necessary for the union to represent a majority of a company's employees. *See United States v. Pecora*, 267 F.2d 512, 515 (3d Cir. 1959) ("some Union members" in crew sufficient).

In *United States v. Lanni*, 466 F.2d 1102, 1108 (3d Cir. 1972), we held that:

> [o]ur purpose is to interpret a statute so that it fulfills the legislature's purpose and not to construe it, as appellants would have us do, to subvert the legislative intent. The statutory

> purpose [of section 302] is clear: The stamping out of 'all forms of bribery' between management and labor officials.

It was certainly reasonable, given the evidence in this case, for the jury to conclude that Paone as an official of Local 863 represented the office employees because they were provided with welfare benefits through the union plan and their membership in the local. Such a conclusion is consistent with both the facts and the definition of representative under section 302.

B.

The facts with respect to the elements of section 302(a)(2) are not complicated either. The crucial question was whether Local 863 or any of its officers sought to represent or would have admitted to membership the driver employees of FTI. It was admitted that FTI operated within the territorial jurisdiction of Local 863. The defendants claim that several factors rendered it impossible for Local 863 to admit the FTI drivers to membership. They point to a 1963 Memorandum of Understanding between the New York and New Jersey Joint Councils of the Teamsters which purportedly allowed union locals to follow the work in cases such as the creation of FTI, and to a decision of a Teamsters Joint Council awarding jurisdiction over FTI to Local 202 based on that memorandum of understanding. They contend also that the "contract bar" rule operated to prevent Local 863 from admitting the FTI drivers to membership.[3]

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3. The contract bar rule is a creation of the National Labor Relations Board that limits the ability of rival unions to attempt to organize workforces which are already represented by another union and working under a collective bargaining agreement. It is implausible that the contract bar could have prevented Local 863 from asserting its jurisdiction during the

The government argued essentially that Local 863 could assert a colorable claim to the right to organize the FTI drivers, either on the basis of territoriality in defiance of the Teamsters Joint Council, or on the basis that indicia of an employment relationship between Foodhaulers and the FTI drivers rendered the subcontract a sham. Local 863's potential for disrupting FTI's subcontract provided the motive and purpose behind the payoff scheme, and the government argued that such a relationship is within the ambit of the "would admit to membership" language of section 302(a)(2).

The district court held that the legal or practical impossibility of organizing the FTI drivers could be considered by the jury, but that it was not conclusive as a matter of law on the question whether Local 863 would have admitted the drivers if it could have. It concluded that a rational jury could find that Local 863 would have admitted the FTI drivers despite the memorandum of understanding. It noted that Local 863 had already participated in a jurisdictional dispute concerning FTI, indicating a desire to represent the drivers, and that the jury could conclude that it might do so again.

The defendants argue that the phrase "would admit to membership" means that, at the time the payoffs were made, there must have been a present intention by FTI drivers to apply for membership to Local 863 or a present intention by FTI itself to hire employees who would and could be admitted to membership in Local 863, and does not apply when, as defendants contend here, representation was factually

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entire decade that the scheme was in operation. *See* R. Gorman, *Labor Law* 54-59 (1976) (contract bar rule provides for open period at least every three years during which insurgent unions can challenge incumbents for jurisdiction).

and legally impossible. On its face, this argument would seem to render the "would admit to membership" language superfluous, since section 302(a)(2) also prohibits payments to officers of a labor organization which "seeks to represent" a group of employees, language more suited to the "present intention" situation than the phrase at issue here.

We hesitate to "construe a statute to make it redundant of itself," *United States v. Palmieri*, 630 F.2d 192, 199 (3d Cir. 1980). An examination of the legislative history supports a view that the "would admit to membership" sweeps more within its net than the defendants would allow. Section 302 originally proscribed only payments to representatives. However, it was amended to include the disputed language in 1959 by section 505 of the Labor-Managenment Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519. The Senate Report stated:

> Racketeering, crime, and corruption must be stamped out in the labor and management field as elsewhere. The committee bill carries strong measures for driving criminals from labor unions. Its provisions will also bring to light possible conflicts of interest and similar shadowy transactions through which unscrupulous union officials and employers sacrifice the welfare of employees to personal advantage. [The amendments strengthen] section 302 ... by making it applicable to all forms of extortion and bribery some of which may slip through the present law.... The committee bill proposes to close the loopholes [of the 1947 version] ... which both employer representatives and union officials turned to advantage at the expense of employees.

Sen. Rep. No. 187, 86th Cong. 1st Sess., 1959,

reprinted in 1959 U.S. Code Cong. & Admin. News 2318, 2329-30 [hereinafter S. Rep. No. 187].

The Senate Committee cited *Ventimiglia v. United States*, 242 F.2d 620 (4th Cir. 1957), as an example of a loophole that the amendments were designed to close. In *Ventimiglia*, a union officer issued working cards to employees of a non-union contractor to permit them to work without joining the union. In exchange for issuing the cards, the employer paid the union official $100 a month. The court held that because the payoffs were designed to "induce ... [the officer] *not* to organize or represent the employees," 242 F.2d at 623 (emphasis in original), "neither the roofers' union nor the business agent was technically a 'representative' of any of the employer's employees." Sen. Rep. No. 187 (describing *Ventimiglia*), *reprinted in* 1959 U.S. Code Cong. & Admin. News at 2330. The court reversed the official's conviction and Congress decided to overrule that result legislatively.

In our situation, the alleged motivation behind the payoff scheme was identical to that in *Ventimiglia*. In *Ventimiglia*, the employees were unrepresented. Thus, we must decide whether the fact that the FTI drivers were represented by another local distinguishes our situation from *Ventimiglia* as a matter of law and takes it out of the range of payoff schemes that Congress intended to prohibit.

An analysis of the harm done to both the FTI and Local 863 employees persuades us that the distinction between this case and *Ventimiglia* is not great enough to remove it from the sweep of section 302(a)(2). The payoffs to Paone deprived the FTI drivers of the freedom to decide whether to be represented by another local when and if the choice was presented to them, and deprived Local 863 members of the possibility of strengthening their union both numerically and with

respect to the consistency of representation within the geographic jurisdiction of the local. We think that Congress in amending section 302 focussed on the potential for interference in the dynamics of the labor movement and not on whether the payoffs actually caused workers to go unrepresented. There was no guarantee that the workers in *Ventimiglia* would have chosen to be represented by the union whose official was paid off, or that he could have successfully stopped them from working if they did not join. The company avoided the potential for conflict by paying the union official to ignore his duty to his union, and that was what Congress desired to prohibit by amending section 302.

The LMRDA's declared purpose is that labor officials serve as fiduciaries, *see* 29 U.S.C. § 501, and on that basis, Congress decided that "using one's union office for personal financial advantage--playing both sides of the street--is a conflict of interest that corrupts and weakens the national labor movement." *United States v. Cody*, 722 F.2d 1052, 1057 (2d Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984). We believe that the "would admit to membership" language was intended to incorporate situations where, as here, a union official receives bribes from management in exchange for discouraging his union from asserting its claim to jurisdiction, whether or not another local is involved.

The defendants' argument that organization of the FTI drivers was a practical or legal impossibility does not dissuade us here. In many cases there may be practical or legal impediments to the actual organization of a group of workers, and there will undoubtably be some situations in which the impediments are harder to overcome than in others. We are unwilling to hold that, where an employer pays off a union to keep it from attempting to represent its

workers, the existence of possible roadblocks to the actual accomplishment of the union's "threat" will conclusively render section 302(a)(2) inapplicable.

While it may be that some impediments are so insurmountable as to prevent the application of section 302(a)(2) as a matter of law, to describe the impediments in this case as rendering the potential organization of the FTI drivers impossible is mere hyperbole. On this record, the existence of impediments to the organization of the FTI drivers might have made it more difficult for Local 863 to attempt to organize them, but certainly did not make such an attempt impossible. Local 863 could, for example, have sought to have the Joint Council reverse itself, or it could have challenged the subcontract with Foodhaulers as a violation of the collective bargaining agreement. Even if the odds were against the success of such an attempt, we do not think that payments to union leaders to prevent such attempts are necessarily beyond the scope of section 302(a)(2). Assuredly, then, it was not error to submit this issue to the jury in this case.

To hold that section 302(a)(2) requires a present intention rather than a potential to attempt to organize a group of employees would allow employers to evade the operation of section 302 by timing their payoffs in such a way that they were paid at times when a union local could not assert its right, and would require an inquiry into the subjective intentions of employees, employers, and union officials. Congress sought to avoid leaving loopholes for evasion of the prohibitions of section 302 by "proscribing payments to any labor organization, or any officer or employee, which is seeking to represent or would admit to membership any of the employees of the employer." Sen. Rep. No. 187, *reprinted in* 1959 U.S. Code Cong. & Admin. News at 2330.

The defendants point to two cases which they claim support their position. In *United States v. Sink*, 355 F. Supp. 1067 (E.D.Pa.), *aff'd mem.*, 485 F.2d 683 (3d Cir. 1973), we affirmed a district court opinion which found substantial evidence to support the jury's finding that a union would have admitted the employer's employees to membership. In that case, a union official accepted payments of hotel bills at various resorts in exchange for refraining from organizing workers of a corporation that "was actively contemplating expanding," 355 F. Supp. at 1070, into the area of the union's jurisdiction. Noting that section 302 was aimed at "payments by an employer to the labor union representatives of the employer's labor force," *id.*, the court pointed out that the "statute recognized a similar, and possibly greater danger, in comparable situations where the laborers would be organized in the future." *Id.* The court traced the "would admit to membership" language to that concern for future organization.

In its charge to the jury, the court stated that "would admit to membership ... does not mean some indefinite, uncertain, future, vague possibility. It means at the time the acts were performed and done that as of that time there was either a present intention for the employees ... to apply for membership or that there was a present intention for [the company] to obtain work in the Philadelphia area and to employ employees that would and could be admitted to membership." *Id.* at 1071. Defendants rely heavily on this definition, but do not point out that in the very next sentence the court noted that "[t]he charge carefully limited the 'time frame' and thereby may have been more beneficial to the defendant than required." *Id.*

We need not decide whether the language in *Sink* is overly restrictive, as the *Sink* court itself implied,

because in our case the defendants are accused of a payoff scheme aimed at getting Local 863 to refrain from organizing a group of employees presently existing within its area of jurisdiction. Thus, Local 863's relationship to the FTI drivers was a good deal *less* tenuous than the relationship at issue in *Sink*.

The same is true of the second case relied on by defendants, *United States v. Cody*, 722 F.2d 1052 (2d Cir. 1983), *cert. denied*, 467 U.S.. 1226 (1984). In *Cody*, the Second Circuit held that the relationship between the union and the employees was too tenuous to make out a section 302 violation where the employer did not have a contract with the local, did not employ any local members, and there was no evidence that, at the time of the "gifts" to the union official, the employer had actual plans to commence a project that would have required the hiring of local members. In fact, no such project was ever commenced. Thus, the court held, there was an insufficient "nexus" between the union and the company to make out a section 302 violation. The court noted that the language of section 302(a)(2) "requires an *existing* employment relationship ..., not the possibility of a future relationship," 722 F.2d at 1058 (emphasis in original), and went on to point out

> that [section 302(a)(2)] was added in 1959 for a specific reason--to deal with employers' attempts through bribery of union officials to block unionization of their *present* employees.... In other words, the statute was designed to protect the possible future unionization of present employees , not, as here, the possible future hiring of present union members.

Id. at 1058-59 (emphasis in original).

Cody thus supports our position that the "would admit to membership" language applies to the present

situation.[4] It is immaterial to the operation of section 302 whether the purpose of the payoff scheme is to maintain a non-unionized workforce, or to preserve the employer's relationship with a union that he prefers dealing with. Where a payoff scheme exists in a situation where the union "would admit to membership" the employees of the employer, section 302(a)(2) is violated despite roadblocks to the actual organization of the workers. Given our analysis of section 302(a)(2), therefore, we conclude that there was sufficient evidence for the jury to find that Local 863 would have admitted the FTI drivers to membership.

C.

The defendants argue that section 302(a)(4)'s scope is limited to acts committed with the intent to affect the collective bargaining process. Incorporating their arguments discussed in the preceding sections, they argue that since there is no basis for finding either that Paone represented the office employees or that Local 863 would admit the driver employees to membership within the meaning of section 302, the payments could not have been made with the requisite intent.

Again, the defendants would have us read the statute more narrowly than Congress intended and the language of the statute provides. The district court concluded that a reasonable jury could find that payoffs were made to Paone with the intent to influence him in his official capacity, and to insure that Local 863 would not interfere or attempt to interfere with FTI's subcontract. We agree. The statute only requires that the payoffs be intended to influence a union officer

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4. We need not and do not decide whether, on the facts presented in *Cody*, we would hold that no section 302 violation occurred.

"in respect to any of his actions, decisions, or duties as a representative of employees or as ... officer or employee of such labor organizations." Section 302(a)(4). We have already rejected defendants' arguments regarding Paone's and Local 863's relationship to FTI, and there is obviously a sufficient basis for finding that the payments were made with the intent to influence Paone's execution of his duties to the local.

D.

Finally, since section 302(b) prohibits the receipt of payments made in violation of section 302(a), making it illegal for union officials to receive what was illegal for management to pay, it is clear that the jury had sufficient evidence to find that section 302(b) had been violated as well. Thus, we find no error in finding that the defendants were guilty of predicate acts in violation of section 302, or in the district court's denial of defendants' motion to acquit.

IV.

The defendants' next issue concerns the admission at various points in the trial of the out-of-court statements of unindicted coconspirators pursuant to Federal Rule of Evidence 801(d)(2)(E). The out-of-court statements consisted first of a 1979 tape recording of Anthony Carratura, the no-show who became a government informant; Joseph Picco, another of the no-shows; and Fred Paone, one of the middlemen and nephew of defendant James Paone, trying to get their stories straight about what their jobs entailed in anticipation of a government investigation; and, second, testimony concerning out-of-court statements by Sam Botro, another of the middlemen. The tape recording was very damaging to the defense, since it discussed the payoff scheme and implicated

James Paone. Picco, Fred Paone, and Botro were all unindicted coconspirators. The defendants claim that the admission of such evidence violated their rights under the Confrontation Clause of the Sixth Amendment.

The defendants originally based their arguments on the alleged failure of the government to demonstrate the unavailability of the coconspirators at trial, relying on our decision in *United States v. Inadi*, 748 F.2d 812 (3d Cir. 1984), *rev'd*, 106 S.Ct. 1121 (1986).

The government contended as a threshold matter that no proper objection had been made to the introduction of the statements in the district court as required by *United States v. Gibbs*, 739 F.2d 838 (3d Cir. 1984) (in banc), *cert. denied*, 105 S.Ct. 779 (1985). In addition, the government reiterated its disagreement with our holding in *Inadi*. Because the Supreme Court held in *United States v. Inadi*, 106 S.Ct. 1121 (1986), that the *Roberts* unavailability requirements "do not apply to coconspirator statements," *id.* at 1126, we need not decide whether the unavailability issue was preserved in the district court in our case, nor need we decide whether any of the declarants was properly made available.

Following the release of the Supreme Court's *Inadi* decision, we requested comment from the parties on its effect on their arguments. In their response, the defendants point out that, while the Court held that there was no unavailability requirement in the context of coconspirator statements, it noted that the reliability of the out-of-court statements was not an issue in *Inadi*. 106 S.Ct. at 1124-25, n.3. The defendants' attack now shifts to the reliability of the taped conversation.[5] We will assume *arguendo* that the

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5. Because the defendants do not attack the reliability of the Botro statements, we will assume that they concede that there

issue was raised in the district court and is properly before us.

A.

We must determine at the outset the appropriate standard for reviewing the district court's admission of coconspirator statements under FRE 801(d)(2)(E) in the context of a challenge to their reliability. We find no cases in this circuit setting forth such a standard. However, in *In Re Japanese Electronics*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 106 S.Ct. 1348 (1986), we considered the standard of review for determinations of reliability under FRE 803(8)(c) (the records of government proceedings exception to the hearsay rule). While the factors which go into making a substantive determination of the reliability of the proferred evidence are somewhat different under the two rules, the process of making the determination is the same. Under both rules, the district court must make a preliminary factual inquiry, determine what factors are important in assessing reliability, and weigh the factors. In *Japanese Electronics* we held:

> The scope of review of the trial court's trustworthiness determination depends on the basis for the ruling. When the trial court makes Rule 104(a) findings of historical fact about the manner in which a report containing findings was compiled we review by the clearly erroneous standard of Fed.R.Civ.P. 52. But a determination of untrustworthiness, if predicated on factors properly extraneous to such a determination, would be an error of law.... There is no discretion to rely on improper factors. Such

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was no error in admitting them in light of the Supreme Court's opinion in *Inadi*. In any case, we hold there was no indication of unreliability in the Botro statements.

> an error of law might, of course, in a given instance be harmless within the meaning of Fed.R.Civ.P. 61. In weighing factors which we consider proper, the trial court exercises discretion and we review for abuse of discretion. Giving undue weight to trustworthiness factors of slight relevance while disregarding factors more significant, for example, might be an abuse of discretion.

723 F.2d at 265-66. *See also id.* at 257.

In *United States v. Adams*, 759 F.2d 1099, 1105-06 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 275 & 336 (1986), we held that our review of whether, under our holding in *Inadi*, a coconspirator had properly been made available was plenary because resolution of the issue involved the interpretation and application of legal precepts. Reliability and unavailability are both requirements of the Confrontation Clause test set forth by *Ohio v. Roberts*, but we believe there is an element of discretion involved in weighing the various factors of reliability which is not present in the more straightforward determination of availability, justifying application of the more complicated *Japanese Electronics* standard.

B.

The defendants claim that the taped conversation is unreliable and that its admission therefore violated the defendants' rights under the Sixth Amendment. They argue first that this case differs from *Inadi* because neither of the defendants were parties to the taped conversation. The only party to the conversation to testify at the trial was the government informant, Carratura, who had an interest in producing convictions, and the district court admitted some of Carratura's statements which he held had been adopted by Picco and Fred Paone. The defendants

argue that the Supreme Court's *Inadi* holding does not apply in such circumstances. Therefore, they argue, it was reversible error for the government not to produce Picco and/or Paone at trial or demonstrate their unavailability.

They further argue that it was necessary to make Picco and Paone available because the defendants could not explain or contradict the statements made on the tape. The defendants also reclothe some of their arguments about whether the taped conversation satisfied the elements of FRE 801(d)(2)(E), discussed *infra*, into Sixth Amendment arguments. Finally, the defendants attack the reliability of the tapes because they claim their contents are contradicted by other evidence some of which was introduced at trial and some of which defendants claim was discovered after trial.

The defendants' arguments betray a fundamental misunderstanding both of the Supreme Court's *Inadi* decision and the elements to be considered in a determination of reliability. *Inadi* held that there is no requirement that the government produce the declarants or demonstrate that they were unavailable when coconspirator statements are introduced under FRE 801(d)(2)(E). The Court's reasoning was not founded on the facts of *Inadi*, but on the nature of coconspirator evidence and the historical development of the rule allowing its admission.

Coconspirator statements differ from the types of out-of-court statements where *Roberts* requires a showing of unavailability in that they are not a substitute for live testimony but "provide evidence of the conspiracy's context that cannot be replicated, even if the declarant testifies to the same matters in court." *Inadi*, 106 S. Ct. at 1126. For this reason, the Court held that "the unavailability rule, developed for cases involving former testimony, is not applicable to

coconspirators' out-of-court statements." *Id.* Thus, any attempt to resurrect an availability requirement because the tapes in this case are less reliable than those in *Inadi* is foreclosed: there is no longer any such constitutional requirement in the FRE 801(d)(2)(E) context.

We derived the availability requirement in our holding in *Inadi* from *Ohio v. Roberts*, 448 U.S. 56 (1980). *Roberts* concerned admissions of prior testimony, not coconspirator statements, and held that "[t]he Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." 448 U.S. at 65. The first, under the circumstances operative in that case, is an availability requirement, and the second is that the statements must bear sufficient "indicia of reliability." 448 U.S. at 65-66. We have often held that coconspirator statements "must bear sufficient 'indicia of reliability' to demonstrate their trustworthiness," *United States v. Ammar*, 714 F.2d 238, 253 (3d Cir. 1983), *cert. denied*, 464 U.S. 936 (1982), although all circuits are not in agreement on this point. *See Inadi*, 106 S.Ct. at 1129, n.1 (Marshall, J., dissenting). The issue of reliability was not presented to the Court in *Inadi*, and that decision has thus left our rule undisturbed. *See Inadi*, 106 S. Ct. 1124-25, n.3, and 106 S. Ct. 1129 (Marshall, J., dissenting).

The reliability requirement is separate and distinct from an availablity requirement. While a demonstration of unreliability cannot serve to bootstrap an availability requirement onto admissions of FRE 801(d)(2)(E) evidence, as defendants argue, the question of the reliability of coconspirator statements is of constitutional significance in its own right. *See Dutton v. Evans*, 400 U.S. 74, 88-89 (1970). Indeed, it is through a determination of the reliability of coconspirator statements that we carry out "the

mission of the Confrontation Clause[, i.e.,] to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton v. Evans*, 400 U.S. at 89, *quoting California v. Green*, 399 U.S. 149, 161 (1970).

Coconspirator statements do not possess the special trustworthiness characteristic of evidence falling within "a firmly rooted hearsay exception." *Ammar*, 714 F.2d at 255, *quoting Ohio v. Roberts*, 448 U.S. at 66. They are instead admitted because of "the legal fiction that each conspirator is an agent of the other and that statements of one can therefore be attributable to all." *Ammar*, 714 F.2d at 255-56. Thus, the Confrontation Clause requires a showing of reliability in addition to the requirements set forth in FRE 801(d)(2)(E).

While "in many, if not most, instances a coconspirator statement which is admissible under Rule 801(d)(2)(E) will also be sufficiently reliable to satisfy the Confrontation Clause,' *Ammar*, 714 F.2d at 256, many courts including ours have used the factors set forth in *Dutton v. Evans* as a benchmark for assessing reliability in the constitutional context, although "'a statement may be admitted over confrontation clause objections even if it does not pass scrutiny under each prong of the *Dutton* test.'" *Ammar*, 714 F.2d at 256, *quoting United States v. Perez*, 658 F.2d 654, 661 (9th Cir. 1981). The *Dutton* factors are 1) whether the declaration contained assertions of past fact; 2) whether the declarant had personal knowledge of the identity and role of the participants in the crime; 3) whether it was possible that the declarant was relying upon faulty recollection; and 4) whether the circumstances under which the statements were made provided reason to believe that

the declarants had misrepresented the defendant's involvement in the crime. *See Ammar*, 714 F.2d at 256, *citing Dutton v. Evans*, 400 U.S. at 88-89.

Thus, the bulk of the defendants' arguments with regard to the reliability of the tapes are simply not relevant to a determination of reliability. Contentions that the substance of the coconspirator statements is contradicted by other evidence simply have no bearing on the reliability of the statements for Confrontation Clause purposes. The credibility of the statements in the face of other evidence is, of course, for the jury to assess. Similarly, the mere fact that statements were not made under the circumstances required by FRE 801(d)(2)(E) does not predetermine whether the statements are reliable in the Sixth Amendment context, because the Constitution permits the introduction of a broader range of coconspirator statements than does the federal rule, as *Dutton* itself makes clear. *See Dutton*, 400 U.S. at 82.

Finally, the fact that the defendants were not participants in the taped conversations does not impede their admissibility so long as the statements are determined to be reliable.

> Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy. The same is true of declarations of coconspirators who are not defendants in the case on trial.

United States v. Nixon, 418 U.S. 683, 701 (1974). Indeed, at least one of the tapes in *Inadi* recorded a conversation between unindicted coconspirators. *Inadi*, 748 F.2d at 815 (conversation between McKeon

and Marianne Lazaro, both unindicted coconspirators).

At best, defendants' post-argument letter brief, which does not attempt to frame its arguments according to *Ammar* and *Dutton*, can be read to challenge the first, second, and fourth *Dutton* factors. There is no contention that any of the matters discussed were inaccurately presented because of faulty recollection.

The first *Dutton* factor is whether the declaration contained assertions of past fact. The defendants objected to the entire taped conversation as a narrative of past events in the course of their arguments that the statements did not meet the "during the course and in furtherance of the conspiracy" requirements of FRE 801(d)(2)(E). The district court found that the statements had been made in furtherance of the continuing operation of the conspiracy and for purposes of reassuring the conspirators and maintaining trust and cohesiveness among them. We held in *Ammar* that "[s]uch statements are more than 'mere narratives' of past events." *Ammar*, 714 F.2d at 252.

While we confront this issue in a slightly different context, we find that *Ammar*'s reasoning applies. The coconspirators in the conversation in question were trying to devise a way to conceal the scheme of criminal behavior that was still ongoing, and indeed continued for another two years or so. Any discussion of past events was an integral part of the business at hand, and is therefore not a mere narrative of past events. For purposes of the *Dutton* test, then, the mere fact that there was some discussion of past events does not render the statements unreliable.

The defendants argue that only Carratura's statements connect the participants in the conversation with the defendants. Taking this as a

contention that there is no showing that coconspirators Picco and Fred Paone had personal knowledge of the defendants' participation in the conspiracy, we must reject it. The district judge found that Fred Paone's response "Right" to Carratura's reference to a meeting at a Newark restaurant between Carratura, Fred Paone, and James Paone was a factual assertion of the existence of the meeting unambiguously adopted by Fred Paone. As such, it was admissible against the indicted conspirators in the same way that any other coconspirator statement is admissible, i.e., when the requirements of FRE 801(d)(2)(E) are met.

We cannot say the district court's finding is erroneous. The meeting linked James Paone directly to the conspiracy and to these coconspirators. Pecora was linked to the scheme through other evidence at the trial. Here, the participants were thoroughly familiar with their end of the conspiracy. Thus, any contention that the second *Dutton* factor was not satisfied is without merit.

Finally, the defendants challenge the reliability of the tapes because Carratura had an interest in steering the conversation, since he was an informant and no longer a coconspirator at the time of the conversation. The district court agreed. The tape was carefully redacted before being played to the jury to remove all statements by Carratura except those that the court found were unambiguously adopted by Picco and/or Fred Paone. The district court thus avoided any potential prejudice caused by Carratura's status as a government informer. The defendants do not contend that Picco or Fred Paone had reason to manipulate the conversation. Indeed, it was in their interest to devise a scheme that could both conceal the existence of the ongoing conspiracy and the parts they had played in it. Since there was no divergence of interests between

Picco and Fred Paone and the defendants, there is no reason to believe that the declarants misrepresented the true nature of the conspiracy. *C.f., Lee v. Illinois*, 54 U.S.L.W. 4553, 4559 (1986) (reliability of codefendant's confessions suspect because of "strong motivation to implicate defendant and exonerate himself"). Thus, an examination of the fourth *Dutton* factor shows no reason to doubt the reliability of the tapes.

In light of the foregoing, we hold that the tapes bore sufficient indicia of reliability to satisfy the Confrontation Clause of the Sixth Amendment.

V.

The defendants also challenge the admission of the tapes on the basis that the "in furtherance of the conspiracy" requirement of FRE 801(d)(2)(E) was not met. Because this question involves the application of legal precepts to the facts surrounding the conversation, our review is plenary.

Rule 801(d)(2)(E) allows admission of an out-of-court statement if "[t]he statement is offered against a party and is ... (E) a statement made by a coconspirator of a party during the course and in furtherance of the conspiracy." Coconspirator statements may be admitted under the rule if they meet three conditions: "(1) there must be independent evidence establishing the existence of the conspiracy and connecting the declarant and defendant to it; (2) the statement must have been made in furtherance of the conspiracy; and (3) it must have been made during the course of the conspiracy." *Ammar*, 714 F.2d at 245.

The defendants contend that the government did not satisfy the second requirement because the purpose of the conversation was to conceal the declarants' participation in the conspiracy at a time when the declarants were no longer conspirators,

having terminated their involvement. They claim that the conversation furthered an entirely separate conspiracy to obstruct justice, and was therefore not admissible. In support of these contentions, defendants rely on a line of cases that they interpret to hold that acts of covering up or concealing the existence of a conspiracy are never acts in furtherance of the conspiracy: *Grunewald v. United States*, 353 U.S. 391 (1957); *Lutwak v. United States*, 344 U.S. 604 (1953); and *Krulewitch v. United States*, 336 U.S. 440 (1949), among others.

It distorts those cases, however, to read them for the broad proposition that no acts of concealment can be in furtherance of a conspiracy. All three cases hold that declarations evidencing an agreement to conceal a conspiracy made "after the conspiracy has ended," *Lutwak*, 344 U.S. at 618, or "after [the] objectives [of the conspiracy charged in the indictment] either had failed or been achieved," *Krulewitch*, 336 U.S. at 442, are not made in furtherance of the conspiracy.

If the acts of concealment amount to "nothing more than ... (1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light," *Grunewald*, 353 U.S. at 403, then declarations made during an agreement to conceal are indeed not made in furtherance of the conspiracy. But *Grunewald* cautions that

> [b]y no means does this mean that acts of concealment can never have significance in furthering a criminal conspiracy.... [A] vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central purposes

> have been attained for the purpose only of covering up after the crime.

353 U.S. at 405.

Grunewald, in other words, directs our attention to the function served by the act of concealment in relation to the objectives of the conspiracy. "The 'in furtherance' requirement is usually given a broad interpretation." *Gibbs*, 739 F.2d at 845. In this case, the concealment of the existence of the conspiracy served not only to cover up the declarants' past participation in criminal behavior, but to shield the ongoing conspiracy as well. We held in *United States v. Lowell*, 649 F.2d 950, 959 (3d Cir. 1981), that a jury could find that a phone conversation evidencing an act of concealment was an act in furtherance of the conspiracy if the purposes or objectives of the conspiracy had not yet been achieved. *See also United States v. DePeri*, 778 F.2d 963, 982 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1518 (1986) ("conversation between members of the conspiracy apprising one another of their efforts to avoid indictment and conviction ... were made in furtherance of the conspiracy"). Here, where the concealment of the existence of the conspiracy enabled the defendants to continue their illegal payoff scheme for two more years, it was no error to hold that the statements were made in furtherance of the conspiracy.

This holding is unaffected by defendants' argument that the declarants were no longer members of the conspiracy and therefore that the 801(d)(2)(E) in furtherance requirement was not met. The defendants' only support for their assertion is that the declarants were no longer active participants in the payoff scheme at the time of the conversation. We have often held that "[m]ere cessation of participation in the conspiracy is not enough." *Lowell*, 649 F.2d at 957. *See Gibbs*, 739

F.2d at 845 (citing cases). The government showed at trial by a preponderance of the evidence that the declarants had been part of the conspiracy prior to the conversation and that showing is not challenged here. There was certainly sufficient basis in the record for the district court to find that the declarants had not withdrawn from the conspiracy at the time of their statements.

VI.

In addition to the issues discussed at length above, the defendants presented a number of other issues. First, we have examined defendants' contentions that the district court erred in denying their motions for a new trial on the basis: 1) that the verdict was against the weight of evidence; 2) of newly discovered evidence; 3) that the district court's instructions to the jury were confusing, prejudicial, unfair, and erroneous as a matter of law; and 4) that the district court erred in holding that the admission of evidence concerning defendant Pecora's brother and father, both high officials in Local 863, was harmless error. We find these contentions without merit and reject them without further discussion.

Second, the defendants claim that the government impermissibly amended its theory of the case in mid-trial and that the district court amended the indictment by allowing the government to introduce evidence concerning defendant Pecora's father and brother. In reviewing the record, we find no amendment of or variance from the indictment, and we reject defendants' argument accordingly.

The defendants also contend that the release during the course of the trial of the district court's opinion in *United States v. Local 560*, 581 F. Supp. 279 (D.N.J. 1984), *aff'd*, 780 F.2d 267 (3d Cir. 1985), resulted in substantial publicity which adversely

affected their right to a fair trial. The *Local 560* case was an unrelated civil RICO case that coincidentally happened to involve labor racketeering charges against Teamster officials of a different local in northern New Jersey. Publicity concerning a wholly unrelated case does not come within the cases cited by the defendants, *e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1956); *Irwin v. Dowd*, 366 U.S. 717 (1961); and *United States ex. rel. Doggett v. Yeager*, 472 F.2d 229 (3d Cir. 1973). All those cases involve substantial adverse publicity concerning the defendants themselves and their connection to the crime for which they were being tried. There is no such showing here and we decline to extend those cases to the situation before us.

The defendants contend that the district court's decision to allow the jury to use the transcript of the taped conversation as an aid in its deliberations prejudiced their right to a fair trial. We find nothing in the record to indicate that the jury relied improperly on the transcript or that the transcript contained inaccuracies that would substantially affect defendants' rights in the event the jury had relied upon it. *See United States v. Hans*, 738 F.2d 88 (3d Cir. 1984).

Finally, defendants point to examples of alleged prosecutorial misconduct which they contend denied them a fair trial. The examples are: 1) two instances of alleged improper presentation of evidence concerning prior convictions of no-show employees; 2) the suggestion by the prosecutor in the presence of the jury that the jury might use the transcript of the tape as an aid in its deliberations; 3) alleged improper introduction of evidence concerning Thomas Pecora's father and brother; 4) failure to advise the defendants of the whereabouts of the informant, Carratura; and 5) alleged improper gestures and comments made by the

United States Attorney during the course of the trial. We have examined the record and find that some of these instances did not constitute misconduct at all, or any other type of error, and that those that arguably might have been misconduct were minor and were adequately cured by cautionary instructions from the district court. We find that no "'prejudice inure[d] to the defendant from the challenged improprieties.'" *Adams*, 759 F.2d at 1111, *quoting United States v. Somers*, 496 F.2d 723, 737 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974), and we accordingly reject defendants' argument.

VII.

We have considered all arguments made by the defendants, and conclude that they lack merit. The judgments of the district court will be affirmed in all respects.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 84-5698 and 85-5386

UNITED STATES OF AMERICA

v.

PECORA, THOMAS, Appellant in No. 84-5698
PAONE, JAMES, Appellant in No. 85-5386

(D.C. Cr. No. 82-00233-02 & 01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE --- DISTRICT OF NEW JERSEY

Present: SEITZ, BECKER and ROSENN,
Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the -- District of New Jersey and was argued by counsel on September 12, 1985

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered October 3, 1984, be, and the same are hereby

affirmed.

ATTEST:

/s/ Sally Mrvos
Clerk

July 2, 1986

Certified as a true copy and issued in lieu of a formal mandate on August 29, 1986.

Test: /s/ Betty J. Robinson

Deputy Clerk, United States Court of Appeals, for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5698
No. 85-5386

UNITED STATES OF AMERICA

v.

THOMAS PECORA
JAMES PAONE,

Appellants.

Thomas Pecora, Appellant in No. 84-5698
James Paone, Appellant in No. 85-5386

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, and ROSENN, Circuit Judges.

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted

for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Collins J. Seitz
Circuit Judge

DATED: August 21, 1986

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CRIMINAL ACTION NO. 82-233

UNITED STATES OF AMERICA :

Plaintiff, :

v. : OPINION

JAMES PAONE and :
THOMAS PECORA

:

Defendants.

:

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ACKERMAN, District Judge.

The defendants in this case are James Paone and Thomas Pecora. They were

indicted on charges of violating the Racketeer Influenced and Corrupt Organizations Act (RICO or "the Act"), 18 U.S.C. §§ 1962(c) and (d). Count one of the indictment charges defendants with conspiring to violate § 1962(c) in violation of §1962(d) of the Act by agreeing to conduct or participate in the conduct of an enterprise, Federico Trucking, Inc., through a pattern of racketeering activity, namely numerous acts of labor bribery under the Taft Hartley Act, 29 U.S.C. §§ 186(a) and (b). In particular, the indictment charges that defendant Pecora, the general manager of Federico Trucking, paid various kickbacks to defendant Paone through a scheme of no-show employees in return for certain official favors from Paone in his capacity as an official at Local 863 of the International Brotherhood of Teamsters

(Local 863). Count two of the indictment charges defendants with violations of § 1962(c) for the commission of the substantive acts charged in count one. See discussion infra.

The case was tried to a jury and both defendants were convicted on all counts of the . indictment. The verdict was returned on March 15, 1984. Before the case was submitted to the jury and at the close of the trial, however, both defendants moved this court for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. As provided by that rule, this court reserved decision on defendants' motion until the jury had returned a verdict. Rule 29(b). This case is presently before me on defendants' motion for a judgment of acquittal and on the motion of both defendants, made after the jury returned its verdict, for a new

trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

Motion for Judgment of Acquittal

I turn first to the defendants' motion for judgment of acquittal made at the close of trial. In ruling on a Rule 29 motion, the question to be answered "is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could [find] the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); see also Tibbs v. Florida, 457 U.S. 31, 41 (192); United States v. Dixon, 658 F.2d 181, 188 (3d Cir. 1981). As Judge Prettyman stated, the trial judge "must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a

reasonable mind might fairly conclude guilt beyond a reasonable doubt." Curley v. United States, 160 F.2d 229, 232-33 (D.C.Ct. of App. 1974) quoted in United States v. Gross, 375 F.Supp. 971, 973 (D.N.J.), aff'd 511 F.2d 910 (3d Cir. 1974); cert. denied, 423 U.S. 924 (1975).

Applying this standard to a careful review of the evidence adduced at trial, I find, for the reasons set forth below, that the evidence was sufficient to support the verdict and that the motions for a judgment of acquittal should be denied.

Section 1962 of Title 18 of the United States Code states in pertinent part as follows:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of

> racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a),(b), or (c) of this section.

18 U.S.C. §§ 1962(c) and (d). The relevant terms are defined in 18 U.S.C § 1961(1)(C). A "pattern of racketeering activity" involves "at least two acts of racketeering activity, one of which occurred after the effective date of this Chapter and the last of which occurred within ten years...after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5). The act defines "enterprise" as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

As noted supra, the predicate acts of racketeering activity with which both

defendants are charged in the indictment are acts of labor bribery in violation of 29 U.S.C. §§ 186 (a) and (b). Section 186 provides in pertinent part as follows:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or ...
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of

> his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.
>
> (b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section ....

Defendants Paone and Pecora do not seriously dispute that the evidence adduced at trial, viewed in a light most favorable to the government, is sufficient to warrant the conclusion by a jury that Federico Trucking is beyond a reasonable doubt an enterprise with which both the defendants are associated within the meaning of RICO and its specific provisions quoted supra. Defendants do, however, contest the sufficiency of evidence with regard to the underlying predicate acts of racketeering activity, that is, whether the evidence

supports a conclusion that the elements of 29 U.S.C. §§ 186(a) and (b) have been met beyond a reasonable doubt. Because § 186(b)(1) is essentially derivative of subsection (a) liability, I will focus my analysis on the latter. I note that there is no dispute that Federico Trucking is an "employer" within the meaning of § 186.

Defendants were indicted under RICO on predicate acts of racketeering consisting of violations of 29 U.S.C. §§ 186(a)(1), (1), (4) and 186(b). Common to liability under subsections (a)(1), (2) and (4) is a requirement that an employer or one acting in the interests of an employer "pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value" to any individual acting in the capacity described in the subsections. Viewing the evidence adduced at trial in a light most favorable to the government, I find that a

rational jury could find beyond a reasonable doubt that defendant Thomas Pecora paid or agreed to pay money or other things of value to James Paone. Similarly, I find that a rational jury could find beyond a reasonable doubt that defendant James Paone accepted or agreed to receive or accept a payment or thing of value under 29 U.S.C. § 186(b)(1).

At trial, Anthony Carratura, a government informant, testified that he was a no-show employee at Federico Trucking. Although checks were issued to him and he was on the Federico payroll as a "spotter" he in fact never worked for the company. He further testified that at times he cashed his checks and turned the money over to either defendant James Paone's nephew, Fred Paone, a Mr. Caprio, or to Sam Botro, the proprietor of a barbershop located a few doors away from Local 803's former

offices. Carratura testified that he met and discussed drop-off arrangements with James Paone and that defendant Paone told him at one time "not to give the checks to Freddie Paone and Dad Caprio [but to] bring them up to the barbershop." He also testified that at times the checks were turned directly over to Botro without endorsement and that Botro's name later appeared on the back of the checks. This testimony is corroborated by the tape recorded conversation of December 31, 1979 which I earlier ruled was admissible and was accordingly played for the jury's consideration.

The appropriately redacted transcript of the recording which was given to the jury at trial for their aid in following the recording contained inter alia the following exchange:[1]

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[1]The jury was instructed that the transcript was not evidence.

Tony (Carratura): If you'll remember the only time that I brought it up to the barbershop is when -- I was giving the money to Dads, remember"

Fred (Paone): Yeah.

Tony: ...when him and I were doing business.

Fred: Yeah, yeah, okay.

Tony: And then, he wasn't turning it all in or something. Remember you took me to 21 to meet your uncle or whoever he was.

Fred: Right

Testimony at trial further revealed that defendant Pecora hired and fired some if not all of the no-show employees at Federico and that defendant Paone's sister, Theresa Paternostro, was placed on Local 863's health and welfare benefit plan based on employer contributions to the health and welfare fund made by Federico Trucking. While it is true that two alleged no-show employees, Wilson and Vendetti, testified

that they did in fact work for Federico Trucking, a reasonable jury could find their testimony not credible. In sum, I find that a jury could find that money or other things of value were transmitted from Federico Trucking in part through the complicity of defendant Pecora to James Paone at Local 863.

I turn now to a review of the sufficiency of the evidence regarding the elements of § 186(a)(1). Section 186(a)(1) makes it unlawful for an employer to pay something of value to "any representative of any of his employees." Both defendants have argued previously that "representative" under this subsection means one who is empowered to represent employers with regard to their wages, hours and working conditions. In support of this argument, defendants cited this court to United States v. Ryan, 350 U.S. 229 (1956).

In denying defendants' motion for a Rule 29 judgment of acquittal at the close of the government's case, I held that "[t]o the contrary,... this case supports a broad reading of the term 'representative' to mean 'individuals who represent employees in their relations with the employers,' id. at 307, not limited to an "exclusive bargaining representative." Id. at 306." Mirroring the language of the Ryan case, I charged the jury as follows:

> Now, the term representative means, one who represents employees in their relations with the employers. The mere fact that employees of Federico Trucking may have been members of the Local 863 Welfare fund, or that Mr. Paone may have been a trustee of that fund may not be sufficient to make either Paone or Local 863 a representative under this statute... You may, however, consider these factors along with a variety of others, such as whether this [sic] employees paid dues, whether they had negotiated or were parties to a collective bargaining

> agreement or whether Paone or Local 863 were empowered to act on their behalf with regard to their employer. To be a [representative] within the meaning of section 186(a)...you need not find that Paone or Local 863 was a exclusive bargaining representative.

Transcript (TR) at 65, March 14, 1984.

Under this standard, I find now, as I found in my earlier Rule 29 ruling in this case, that viewing the evidence in a light most favorable to the government a rational jury could find that defendant Paone was a "representative" beyond a reasonable doubt. Testimony at trial indicated that the office employees at Federico Trucking paid union dues to Local 863. While defendants argue that there were no office employees who were not supervisors at Federico Trucking during the period in question, a jury could find otherwise. Commencing in 1979, if not before, a Ms. Cesare was a

clerical employee. Documentary evidence introduced at trial indicates that dues were paid on behalf of a truck driver, Mr. Johnson, Mrs. Paternostro, who was not in fact an employee at all as well as on behalf of one Mr. Velez who was a "helper" subsequently promoted to a supervisory position. These employees and others were listed by Local 683 as being on "withdrawal" after they stopped paying dues, indicating that they had indeed been members of the Local. Furthermore, Federico Trucking made contributions to the 863 Welfare Fund and its office employees received their fringe benefits through the Fund. These facts could support a conclusion that defendant Paone represented employees of Federico Trucking within the meaning of § 186(a)(1) beyond a reasonable doubt.

I turn now to the sufficiency of evidence regarding the elements of §

186(a)(2). Subsection 186(a)(2) makes it unlawful for an employer to pay anything of value to a labor organization or its employee who "represents, seeks to represent or would admit to membership, any of the employees of such an employer." Because it supplements the language of § 186(a)(1), the critical phrase for purposes of this case in § 186(a)(2) is "seeks to represent or would admit to membership". The question, then, is whether there is sufficient evidence to support a conclusion that Local 863 or any of its officers or employees seeks to represent or would admit to membership the driver employees of Federico Trucking.

On the meaning of "would admit to membership", I charged the jury as follows:

> Would admit to membership means that Local 863 would organize or otherwise represent Federico drivers. You may not find that Local 863 would have admitted these drivers to

> membership based on speculation alone. However, you may consider the following factors in making your determination:
>
> (1) The history of representation or attempts to represent the employees of Federico Trucking.
>
> (2) Any evidence that Local 863 had decided to organize or represent Federico Driver employees or any evidence of a decision not to organize or represent these drivers.
>
> (3) In addition, you may consider that the parties have stipulated that Local 863 'did represent and would under appropriate circumstances, admit to membership persons employed by various trucking companies, which transported goods and commodities between points within and without the state of New Jersey.'

Tr. at 67, March 14, 1984. The defendants argue that Local 863 would not admit these driver employees to membership because, under the "contract bar rule," an administrative policy espoused in the

decisional law of the National Labor Relations Board, Local 863 could not have organized or represented these drivers. As my charge to the jury indicates, however, I do not find the statutory language to be co-extensive with the contract bar rule even if it were applicable to this case. In short, while the legal or practical impossibility of organizing or representing these drivers due to the jurisdiction of other union Locals may appropriately be considered by the jury, such alleged impossibility is not conclusive as a matter of law on the question of whether Local 863 would have admitted these drivers to membership if it could.

I find that the evidence adduced at trial is sufficient to support a conclusion that at all times relevant to this case, Local 863 would have admitted Federico Trucking driver employees to membership.

First, as noted in my charge to the jury, it is a stipulated fact that as a general matter, Local 863 would admit to membership driver employees transporting goods within and without the state of New Jersey. Second, it is undisputed that Local 863 was the exclusive bargaining representative of the driver employees of Foodhaulers, Inc., the company with which Federico Trucking had subcontracted.

Finally, the evidence introduced at trial regarding the history of representation by various union locals of Federico Trucking and its parent company in New York, S. Federico, is not contrary to defendants' arguments, conclusive. The defendants introduced evidence to the effect that Local 202 represented the driver employees of S. Federico at the time that Federico Trucking was created in New Jersey. A jurisdictional dispute followed

on the question of which union local would represent the New Jersey employees. The dispute was resolved by a Joint Council of the International Brotherhood of Teamsters which decided that Local 202 would cross the river and represent the driver employees of Federico Trucking as well. This decision was made in light of a Memorandum of Understanding dating back to 1983 between the Joint Councils of New York and New Jersey, and was manifested in an addendum to the collective bargaining agreement between Local 202 and the driver employees of S. Federico.

As noted supra, defendants argue that in light of this history, Local 863 could not have represented the Federico drivers and, therefore, would not have admitted them to membership. I am not persuaded that, as a matter of law, this is so. In any event, I conclude that a rational jury

could find that Local 863 would in fact have admitted Federico's drivers to membership despite the bar posed by the Memorandum of Understanding.

The evidence at trial indicates that Local 863 was a party to the jurisdictional dispute which arose when Federico Trucking was formed. Specifically, there is a letter in evidence written by a Mr. Aronson, an attorney for Federico Trucking, stating as follows: "Above matter listed for hearing on April 26, 1973. I am in receipt of a letter from Local 863, IBT to the Joint Council requesting a hearing to resolve the jurisdictional dispute between Local 863, 202 and 701." This letter appears to establish that Local 863 had actually attempted to organize or otherwise represent these drivers at some time in 1973. Further, this fact indicates an intention or desire to organize or

represent the Federico drivers which is more than speculation alone. From this evidence, a jury could conclude beyond a reasonable doubt that Local 863 had attempted to admit the Federico drivers to membership in the past and would do so in the future at such time, for example, as the existing collective bargaining agreement expired. Counsel for defendant Paone conceded as much at oral argument when he stated that "[f]rom 863's point of view...if 202 is found to be lacking in jurisdiction then I certainly want to be in a position to seek to be designated as representative of these people." Tr. at 32, March 8, 1984.

I turn now to the sufficiency of the evidence regarding the elements of § 186(a)(4). This subsection makes it unlawful for an employer to pay something of value to an officer or employee of a

labor organization "with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization." I have already held that the plain language of § 186(a)(4) does not require a finding that Paone or Local 863 in any way represented the employees of the payor employer. A violation of § 186(a)(4) also occurs where the intent is to influence the officer or employee of the union in any official capacity. I also charged the jury that a specific intent on the part of the payor is required and that such intent may be inferred from motive. See Tr. at 67-69, March 14, 1984.

The government's theory of motive is that the subcontract between Foodhaulers and Federico was in violation of the collective bargaining agreement between

Foodhaulers and Local 863. An intent to influence Paone in his official capacity could, thus, be inferred from Federico's alleged desire to prevent any interference with its subcontract by Local 863 through pay-offs to one of its top officers. In support of its theory, the government introduced evidence to the effect that the drivers who in fact worked for Federico had indicia of employment by Foodhaulers. The government argues that these facts were sufficient to arouse the suspicion of Local 863 that the sub-contracting relationship with Federico was a sham and a cover-up for the hiring of non-863 drivers by Foodhaulers in violation of the union security clause in its collective bargaining agreement.

The evidence in support of this theory is as follows. The testimony at trial indicated that Foodhaulers absorbed the

workers compensation premiums for the Federico drivers, that it administered driving tests to them and had the power to fire drivers who were unacceptable. Further, the testimony indicated that Foodhaulers accepted employment applications, checked references, gave medical exams and I.D. cards to these drivers.

The evidence introduced by the defendants to rebut the proof of motive and any inference of the requisite specific intent is as follows. First, one witness, Mr. Satsky, testified that the collective bargaining agreement between Foodhaulers and Local 863 did not prohibit subcontracting with non-863 employees. Second, defense witnesses testified and counsel has argued that the alleged indicia of employment by Foodhaulers reflected nothing more than compliance with the

requirements of the Interstate Commerce Commission (ICC) by Foodhaulers, the ICC certificate holder for the trucking transport operations in question.

A review of this conflicting testimony, viewed in a light most favorable to the government, leads me to conclude that a reasonable jury could find that payoffs were made to Paone in order to insure that Local 863 would refrain from enforcing the collective bargaining agreement between itself and Foodhaulers to the detriment of Federico's interest in maintaining its sub-contract under terms already in place. In sum, a jury could find beyond a reasonable doubt that Federico made payoffs to Paone with the specific intent of influencing him in his official capacity.

Thus, I conclude that a reasonable jury could find that the evidence in this case establishes the elements of § 186(a)(1),

(2), (4) and (b) beyond any reasonable doubt. In my previous denial of defendants Rule 29 motion to acquit at the close of the government's case, I noted that the evidence was sufficient to establish a "pattern of racketeering activity" under 18 U.S.C. §§1961(1),(5) and 1962 (c) and (d) and to establish that the defendants conducted or participated in the conduct of the enterprise's affairs, that is Federico Trucking Co., through this pattern of racketeering activity. See 18 U.S.C. § 1962(c). I further found at that time that the evidence was sufficient to establish a RICO conspiracy under § 1962(d). The defendants do not raise any question as to the sufficiency of the evidence to establish these elements of RICO as charged and I need not discuss them further.

Motion For New Trial

As noted supra, both defendants have moved for a new trial pursuant to Rule 33

of the Federal Rules of Criminal Procedure. Rule 33 provides in pertinent part that "[t]he court on motion of a defendant may grant a new trial to him if required in the interest of justice." See United States v. Dixon, 658 F.2d 181, 193 (3d Cir. 1981). A motion for a new trial under this Rule is addressed to the sound discretion of the trial court. See United States v. Antone, 603 F.2d 566, 568 (5th Cir. 1979); United States v. Iannelli, 528 F.2d 1290 (3d Cir. 1975); United States v. Byrne, 451 F.Supp. 109 (W.D.Pa. 1978); United States v. Phifer, 400 F.Supp. 719, 722 (E.D.Pa. 1975), aff'd, 532 F.2d 747 (3d Cir. 1976).

Defendant James Paone has raised three grounds for a new trial: (1) newly discovered evidence, (2) jury confusion due to the court's instructions in light of the weight of the evidence and (3) insufficiency of evidence to support the

jury's verdict of guilty. Defendant Thomas Pecora raises two additional grounds for a mistrial: (1) prejudice resulting from references to Joseph Pecora, Sr. and Joseph Pecora, Jr. and (2) a variety of alleged examples of prosecutorial misconduct.

I turn first to defendant Paone's motion for a new trial on the ground of newly discovered evidence. The parties do not dispute the standard applicable to such a motion in this Circuit. The Third Circuit has set forth five requirements: (1) the evidence must have been discovered after the trial, (2) failure to learn of the evidence before trial must not have been caused by the defendant's lack of diligence, (3) the newly discovered evidence must not be merely cumulative or impeaching, (4) the evidence must be material to principal issues and (5) must be such that in a new trial it would

probably produce an acquittal. See United States v. Herman, 614 F.2d 369, 371 (3d Cir. 1980); United States v. Meyers, 484 F.2d 113 (3d Cir. 1973); United States v. Howell, 240 F.2d 149, 159 (3d Cir. 1956).

The newly discovered evidence which defendant Paone argues entitles him to a new trial is evidence regarding the whereabouts of Mr. Botro during the period of time which is the subject of Anthony Carratura's testimony. Carratura was government informer and a key government witness. As noted above, Carratura testified that on twelve occasions he turned his checks from Federico Trucking over to Mr. Botro on the instructions of defendant Paone and his nephew, Fred Paone. He estimated that these dropoffs occurred between April 28 and July 14, 1977. The "new" evidence is an airline ticket, copied from the files of Alitalia Airlines in

Rome, Italy, indicating that a Mr. Botro boarded an Alitalia flight #611 on April 11, 1977 in New York City bound for Rome with a reserved connecting flight to Catania, Sicily. The copy of the ticket is authenticated by the accompanying Affidavit of Francesco Gallo, Administrative Manager of Alitalia for the United States. See Exhibit C to defendant Paone's Notice of Motion for a New Trial. Also accompanying this ticket and Affidavit are two additional Affidavits of Andrew Zazzali, Esq. and Nicholas Dotoli which detail the difficulties and the efforts made in connection with obtaining the information from Alitalia.

I find that this new evidence does not warrant a new trial. While it is true that the evidence was obtained after the trial of this matter, I am not convinced that it could not with due diligence and foresight

have been obtained earlier. Furthermore, while the evidence is indeed material to the credibility of a key government witness, I find it to be "merely impeaching" and of a sort which, given the record at trial, could under no circumstance "probably produce an acquittal" were the case to be tried again. Carratura's testimony at trial was corroborated by the tape recording admitted into evidence. Also, the ticket does not prove beyond any reasonable doubt that Botro took this flight, that the person whose name appears on the ticket is the same individual involved in this case or how long the person remained in Italy. However, even if the ticket could prove that Botro was out of the country during the time in question, I do not believe that Carratura's testimony can be entirely discredited in light of the corroborative

evidence which was before the jury. Further, the evidence indicates that payments were made to Paone through dropoffs to others on numerous occasions over a prolonged period and that at time they were made through his nephew Fred Paone, and at other times through "Dad Caprio" or Botro at the barbershop. Under these circumstances I do not believe that an acquittal would be a likely result of a new trial with introduction of the airline ticket into evidence.

I turn now to defendant Paone's request for a new trial on the ground that this court's instructions to the jury created confusion. Arguing that a new trial is required in the interests of justice, defendant Paone for perhaps the fourth time[2] attempts to persuade this court to

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[2]These issues were raised on both Rule 29 motions for judgment of acquittal and again at the charge conference before submission of the case to the jury.

change its view of the pertinent statutory terms. As I have already explained, see my discussion of defendant's Motion for Judgment of Acquittal supra, I simply do not agree that the term "representative" in 29 U.S.C. § 186(a)(1) means representative with regard to wages, hours, and working conditions alone and defendant has presented no new arguments in this regard. My instructions to the jury reflect my view of the law and I do not believe that they were in any way unnecessarily confusing to the jury.

Similarly, I decline to alter my view of the meaning of the term "would admit to membership" as it appears in 29 U.S.C. § 186(a)(2). I do not agree that the alleged impossibility, as a practical or legal matter, of admission of Federico drivers to membership during much of the period in question is determinative on the issue of

whether Local 863 would admit these drivers to membership if it could. My view of the law in this regard has been set forth in two Rule 29 rulings and in my charge to the jury. Here, too, defendant presents no new legal arguments. I do not believe my charge to the jury was inadequate or confusing in this regard.

Defendant Paone also argues that this court confused the jury by failing to instruct them on each element of the predicate offenses in its charge on both counts one and two. Instead, as defendant acknowledges, the jury was instructed during the charge on count one that the elements of § 186(a) and (b) would be described at a later point. I do not agree that this was confusing to the jury. A charge to a jury on a RICO indictment based on predicate violations of three separate provisions of the Taft-Hartley Act is

necessarily lengthy and complex. If the jury was confused at all, I do not believe that it would have been made any less so if this court had repeated a large section of the instructions twice. In lieu of extensive repetition I chose to refer frequently to other portions of my charge without rereading them in an effort to minimize confusion. I believe that this result was accomplished and that defendant's were not prejudiced thereby. Furthermore, defendants already objected to the charge on this ground after my initial charge to the jury. In response to their objection, I further charged the jury that "the government has the burden to prove violations of 186 ...beyond a reasonable doubt. And that goes to count 1 and count 2 of this indictment." Tr. at 117, March 14, 1984. If members of the jury had any questions on the charge, they were free to

ask for clarification or amplication of my instructions.

Defendant Paone also complains that the charge did not make specific reference to the expert witnesses who testified in his behalf. I do not see how this prejudiced defendant or confused the jury and I remind defendant that the jury was charged on the defense's theory of the case as requested.

The last ground for a new trial raised by defendant Paone is that the weight of the evidence is against the verdict. For many of the reasons set forth in this decision on defendant's motion for a judgment of acquittal, supra, I find that the verdict is not against the weight of the evidence. Consequently, I do not believe that the defendant should be retried in the interest of justice.

I turn now to defendant Pecora's motion for a new trial on the ground that the

court substantially erred in refusing to require proof of the involvement of Joseph Pecora, Sr. and Jr. in the conspiracy charged. Joseph Pecora, Sr. and Jr. are defendant Thomas Pecora's father and brother respectively. In essence, defendant Pecora is concerned that mention of Messrs. Pecora and their positions at Local 863 led to unwarranted inferences prejudicial to his defense. I note first that Biaggio Federico, formerly a defendant indicted at the same time as Paone and Pecora, made a pre-trial motion to strike all references to Messrs. Joseph Pecora. At that time, I found that "the activities of Messrs. Joseph Pecora, Sr. and Jr. as well as their relationship with defendant Thomas Pecora are both relevant and material to the issues to be tried." I also stated that "I do not find the potential for prejudice to outweigh the

probative value of permitting references to unindicted persons allegedly involved in the illegal activities of which defendants are accused in the interest of a full presentation of the facts."

It is true that the government never introduced any evidence in support of its claim that Joseph Pecora, Sr. and Jr. were co-conspirators in the crimes charged albeit unindicted for lack of probable cause. It is for this reason that on defendant's request I instructed the jury "that there are no allegations in this case that Local 863, Joseph Pecora, Sr. and Jr. engaged in any unlawful conduct or in any manner violated the law."' Tr. at 77, March 14, 1984. Defendant Pecora contends that this limiting instruction was insufficient to purge the prejudice which had already accrued to him over the course of the trial. I am not convinced that defendant

was prejudiced, however, in light of the limiting instruction given to the jury and the substantial evidence tending to support the jury's verdict of guilty, I find that any prejudice to the defendant was harmless beyond any reasonable doubt. See Chapman v. California, 386 U.S. 18, 24 (1967); United States v. Scarfo, 685 F.2d 842 (3d Cir. 1982).

I turn finally to defendant Pecora's motion for a new trial on the ground that the cumulative effect of various alleged acts of prosecutorial misconduct was to deny him a fair trial. A United States Attorney such as the one representing the government in this case does indeed have a duty to refrain from acts which might result in a wrongful conviction and to generally maintain a high standard of professional conduct. Berger v. United States, 295 U.S. 78 (1834); United States

v. Somers, 496 F.2d 723, 736 (3d Cir.), cert. denied, 419 U.S. 832 (1974); United States v. American Radiator & Standard Sanitation Corp., 433 F.2d 174, 191 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971). In light of this duty, prosecutorial misconduct is a ground for a new trial under Rule 33. See American Radiator, 433 F.2d at 191; United States v. Vargas, 583 F.2d 380 (7th Cir. 1978). Prosecutorial misconduct which prejudices the substantial rights of a defendant is reversible error, United States v. Somers, 496 F.2d 723, 737 (3d Cir. 1974), and in general "[a]ny error of sufficient magnitude to require reversal on appeal is an adequate ground for granting a new trial." Wright, C., 3 Federal Practice and procedure § 556 at 396 (1982).

Defendant Pecora argues that four distinct incidents of prosecutorial

misconduct, considered in light of their cumulative effect, require a new trial of this case. See Berger, 295 U.S. at 84; United States v. Newman, 490 F.2d 139, 147 (3d Cir. 1974). First, Pecora argues that the presentation of evidence during the government's direct examination of Ronald Vendetti, one of the alleged no-show employees, of his 1975 conviction for bookmarking was contrary to the rules of evidence. Pecora argues that evidence of a "judgment against persons other than the accused" is hearsay and inadmissible "when offered by the Government in a criminal prosecution for purposes other than impeachment." Fed.R.Evid. 803(22). Further, Pecora claims that the government denied, at trial, that the conviction was being used to impeach the witness. What ever the government said at trial, it now states that it presented the evidence to

attack the credibility of the witness. If there is a difference between these two terms it eludes this court. In any event, the evidence was properly used to attack the credibility of Vendetti's hostile testimony on direct examination and this court understood it to have been introduced for this purpose. I find no misconduct by the prosecutor in introducing this evidence.

Second, Pecora claims that the government's attorney attempted to impeach the credibility of another hostile government witness Eugene Wilson (another alleged no-show employee), on direct, through use of a prior conviction in violation of Rule 609(b) of the Federal Rules of Evidence. Rule 609(a) provides that evidence of a conviction is admissible to attack the credibility of a witness on cross-examination under the circumstance

described therein. Rule 609(b) provides as follows:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives on the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

The government admits that the 1972 conviction of Mr. Wilson which it introduced during direct examination was

several months outside of the ten year limit established by Rule 609(b) and concedes that the proper course would have been to discuss the matter at side bar and to obtain the appropriate rule 609(b) ruling from the court regarding the admissibility of the conviction.

In opposition to defendant Pecora's motion for a new trial on this ground, the government argues that the error was inadvertent and, moreover, was harmless under the cases. I agree that the error was harmless. While it is true that impeachment of Wilson's testimony (that he did in fact work for Federico Trucking in contrast to the allegation that he was a no-show employee) was important to the government, it was not critical. Carratura's testimony, as corroborated, could easily have resulted in a finding of guilt beyond a reasonable doubt regardless

of whether Wilson's testimony was unassailed. Where evidence of a conviction is improperly admitted but where the independent evidence of guilt is substantial, the admission of the conviction is harmless. See Chapman, 386 U.S. 18 (1967); Fahy v. Connecticut, 275 U.S. 85 (1963); United States v. Scarfo, 685 F.2d 842 (3d Cir. 1982); United States v. Molt, 615 F.2d 141 (3d Cir. 1980). I thus do not find the presentation of this evidence to be misconduct warranting a new trial.

Third, Defendant Pecora seeks a new trial because the government told the jury that a transcript of the taped conversation was available for their review despite this court's ruling that the transcript was inadmissible. However, this court specifically instructed the jury that the transcript was not evidence and was to be

used by them as an aid to understanding the tape recording only. In light of my instruction to the jury in this regard, while counsel's statement may not have been precisely accurate, it in no way contradicted or overrode the instructions given by this court. I do not find this to be misconduct of the sort that could require a new trial in the interest of justice.

The fourth act of misconduct alleged by Pecora is the mention of Messrs. Joseph Pecora, Sr. and Jr. throughout trial despite the absence of probable cause that they were indeed co-conspirators. I have already found that this was at most harmless error on the government's part and I shall not discuss it further.

In sum, I find the evidence to be sufficient to support the verdict of guilty beyond a reasonable doubt and I, therefore,

deny the motions of both defendants, made at trial, for a judgment of acquittal under Rule 29. Further, I am not convinced that any of the arguments raised by the defendants require a new trial in the interest of justice under Rule 33. I, therefore, deny both defendant's motions for a new trial as well. An order accompanies this opinion.